

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF AND APPENDIX FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

April Term, 1943

No. 8562

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED AUG 26 1943

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NATIONAL METROPOLITAN BANK, a corporation,
Appellant

v.

UNITED STATES OF AMERICA, *Appellee*

APPEAL FROM A JUDGMENT OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF COLUMBIA

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OF THE CITY OF NEW YORK

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IN THE
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FOR THE DISTRICT OF COLUMBIA

April Term, 1943.

No. 8562.

NATIONAL METROPOLITAN BANK, a corporation,
Appellant

v.

UNITED STATES OF AMERICA, *Appellee*

BRIEF FOR APPELLANT.

Jurisdictional Statement.

This appeal by the National Metropolitan Bank (defendant below) is from the judgment of \$18,060.83, with interest and costs, entered against it on June 9, 1943 by the District Court of the United States for the District of Columbia on motion (Appt's App. p. 22) for judgment on the pleadings under Rule 12 (c) of the Rules of Civil Procedure (Appt's App. p. 23). Appellant filed a reply in opposition to the motion, together with points and authorities (R. 31).

The District Court had jurisdiction under Sec. 44, Title 18, 1929 D. C. Code, and this Court has jurisdiction under Sec. 26, same Title and Code.

Statement of the Case.

During the 2¼ years which elapsed between July 13, 1936 and November 16, 1938, the Paymaster of the United States Marine Corps, Washington, D. C., issued and put into circulation 144 normal Government checks, totalling \$18,060.83, drawn payable to the order of *ranking* marine officers, as follows:

- 8 to Lieutenant Colonel C. B. Cates
- 15 to Captain C. R. Wallace
- 23 to Captain H. M. Peter
- 22 to Major B. Dubel
- 12 to Lieutenant Colonel F. A. Hart
- 33 to Captain E. W. Snedecker
- 7 to Lieutenant Colonel W. W. Ashurst
- 9 to Major R. H. Pepper
- 1 to Captain T. B. Jordan
- 1 to Captain A. J. Cincotta
- 2 to Captain J. H. Berry, Junior
- 2 to Captain H. S. Wheeler
- 3 to Captain V. W. Worledge
- 3 to First Lieutenant James A. Hennesy
- 1 to Captain F. C. Donald
- 2 to First Lieutenant G. A. Brace

Noted on each check, as required by law, was the object for which it was given, *i. e.*, pay or pay mileage earned.

Most of the payees and their signatures were well known to the disbursing and accounting officers at Marine Corps headquarters. Photostats of the checks are on file in the Clerk's Office as a part of the record on this appeal.

The checks were signed and authenticated by disbursing officers at Marine Corps headquarters, as follows: Lieut. Colonel Humphries signed checks for \$7655.46. Major Holla signed checks for \$929.03. Major Davies signed checks for \$2860.22. Chief Pay Clerk McGuigan signed checks for \$6324.12. Chief Pay Clerk Armstrong signed checks for \$192.00.

Appellant possessed no proprietary title in the checks or their proceeds. They were received by it from the Anacostia Bank for collection to its account. Upon endorsing them and guaranteeing prior endorsements, appellant presented them at the treasury and upon receiving the proceeds credited them to the account of the Anacostia Bank which, in the regular course of business, checked them out.

In dealing with the checks appellant relied upon their integrity, as they bore all the symbols of authenticity, and believed that they had been lawfully issued to the payees in payment of the object noted on them and that they had been endorsed and negotiated by them.

But in November 1938, after they had gone their course, served their purpose and were redeemed by the Government, the accounting and auditing officers at Marine Corps headquarters, *from the means of knowledge all the while in their possession*, discovered—

(a) That they had not been issued for value, but were surreptitiously issued.

(b) That the payees were ostensible only, consequently they did not have capacity to endorse.

(c) That the payees had not earned them for the object noted on them.

(d) That the payees were not entitled to them, never received them, were not their owners and had not endorsed them.

(e) That James H. Foley, a civilian clerk in Marine Corps headquarters, had fraudulently procured them to be issued and, upon possessing them, forged the ostensible payees' names and cashed or deposited them to his account at the Anacostia Bank.

The Act of Congress dated August 23, 1912, 37 Stat. 375, U. S. C. A. Title 31, s. 82, provides:

“Hereafter the administrative examination of all public accounts, preliminary to their audit by the accounting officers of the Treasury, shall be made as contemplated by the so-called Dockery Act, approved July 31,

1894, and all vouchers and payrolls shall be prepared and examined by and through the administrative heads of divisions and bureaus in the executive departments and not by the disbursing clerks of said departments, except those vouchers heretofore prepared outside of Washington may continue to be so prepared and the disbursing officers shall make only such examinations of vouchers as may be necessary to ascertain whether they represent legal claims against the United States.”

Pursuant to said statute, the United States Marine Corps, years ago, set up and installed in its headquarters a board known as the administrative board. This board was charged with the duty, under the statute, of preauditing all accounts before drawing checks for validation by disbursing officers. And disbursing officers were charged with the duty, before validating the checks, of ascertaining whether the checks were in payment of *legal* claims against the United States.

Owing to the trustworthiness with which Foley was regarded, the administrative bureau and the disbursing officers did not perform those duties in the transactions that he handled. Instead, they allowed him carte-blanche freedom and authority, even access to blank Government checks, and never checked or audited his work.

This led Foley in July, 1936, to begin forgeries on a wholesale scale which he continued undetected for over two years. He did not cover up his tracks as thieves usually do, but left the evidence exposed in the Paymaster's Office at the headquarters of the Marine Corps. His method of procedure is fully set up in appellant's amended answer.

Startled by these revelations, the Secretary of the Navy, about May 1, 1939, convened a board of inquiry for the purpose of—

“inquiring into the circumstances and the general activities of James H. Foley who defrauded the United States of \$18,060.83 and the circumstances which made the execution of such fraud possible.” (Appt's App. p. 10).

Insubordination was doubtless in the Secretary's mind.

Four years after the discovery of Foley's crookedness and the officers' insubordination, this suit was filed for restitution (Appt's App. p. 1).

Appellant filed a comprehensive answer (Appt's App. p. 8) and an amendment thereto (Appt's App. p. 21).

While the case was awaiting trial by jury, as demanded, the Government, upon the Stitely case being decided by this Court on March 1, 1943 (Washington Loan & Trust Co., *et al.* v. United States, 134 Fed. (2) 59), filed a motion (Appt's App. p. 22) for judgment on the pleadings. Appellant filed a reply with points and authorities (R. 31).

Without announcing any opinion or otherwise informing the parties of the basis therefor, the District Court, on June 9, 1943, granted the motion and entered judgment against appellant for the amount sued for, with interest from the date the suit was filed, and costs (Appt's App. p. 23).

Appellant duly noted an appeal, paid into the Registry of the Court \$22,000.00 in lieu of a supersedeas bond (Appt's App. p. 25), and filed a statement of points upon which it relies on this appeal (Appt's App. p. 25).

Statutes Involved.

Act of Congress (August 23, 1912), 37 Stat. 375, U. S. C. A., Title 31, sec. 82:

Hereafter the administrative examination of all public accounts, preliminary to their audit by the accounting officers of the Treasury, shall be made as contemplated by the so-called Dockery Act, approved July 31, 1894, and all vouchers and payrolls shall be prepared and examined by and through the administrative heads of divisions and bureaus in the executive departments and not by the disbursing clerks of said departments, except those vouchers heretofore prepared outside of Washington may continue to be so prepared and the disbursing officers shall make only

such examinations of vouchers as may be necessary to ascertain whether they represent legal claims against the United States.

Sec. 24, Title 22, D. C. Code (1929):

Forged signature.—Where a signature is forged or made without the authority of the person whose signature it purports to be it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority. (Mar. 3, 1901, 31 Stat. 1399, c. 854, sec. 1327.)

Sec. 31, Title 22, D. C. Code (1929):

Presumption of valuable consideration.—Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value. (Mar. 3, 1901, 31 Stat. 1399, c. 854, sec. 1328.)

Sec. 41, Title 22, D. C. Code (1929):

Negotiation.—An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder, completed by delivery. (Mar. 3, 1901, 31 Stat. 1399, c. 854, sec. 1334.)

Sec. 91, Title 22, D. C. Code (1929):

Liability of drawer.—The drawer, by drawing the instrument, admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. * * *. (Mar. 3, 1901, 31 Stat. 1402, c. 854, sec. 1365.)

Sec. 96, Title 22, D. C. Code (1929):

What indorser warrants to subsequent holders.—
Every indorser who indorses without qualification warrants to all subsequent holders in due course—

First. The matters and things mentioned in subdivisions one, two, and three of the next preceding section; and

Second. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. (Mar. 3, 1901, 31 Stat. 1403, c. 854, sec. 1370.)

Textbook Involved.

Daniel on Negotiable Instruments (7th ed. 1933), Vol. 1, sec. 151:

The law abhors fraud and discountenances the instruments by which it may be committed. For this reason bills and notes payable to fictitious payees are not tolerated, and will never be enforced, save when in the hands of a bona fide holder, who received them without knowledge of their true character. The appearance of a name upon the paper as a payee and endorser is naturally calculated, and has been often used as a means to give it fictitious credit, whereby innocent parties are beguiled into purchasing it. The use of fictitious names in this manner has been highly censured * * *.

Statement of Points.

The District Court, upon the pleadings and the law applicable thereto, erred as follows:

1. In granting the plaintiff's motion for summary judgment.
2. In entering the appealed judgment.

3. In adjudging that under no aspect of the defense is defendant equitably entitled to trial by jury.

4. In adjudging that in equity and justice there is no difference, from the Government's standpoint, between a check issued lawfully for a legitimate purpose to a bona fide payee for value which is lost and forged and a check issued unlawfully for an illegitimate purpose to a fictitious payee and delivered by it into the hands of the forger who forges it.

5. In adjudging that though the plaintiff dealt direct with the forger in 144 separate transactions, and it, itself, placed in his hands worthless checks totalling \$18,060.83 as the means with which to successfully carry out his forgeries to fruition, the good faith and innocence of the defendant which never dealt with nor contacted the forger, may be disregarded as immaterial.

6. In adjudging that defendant must pay the Government \$18,060.83 and about \$1,000.00 interest, besides costs, because it innocently turned in, bearing forged payees' endorsements, the 144 checks which the Government years ago issued contrary to prohibition of statutory law in payment of nonexistent obligations, and which it actually placed in the hands of the forger who forged the endorsements.

7. In adjudging that the Government may issue 144 checks contrary to prohibition of statutory law, make them payable to fictitious payees presumably in payment of existing obligations, put them in circulation by placing them in the forger's hands, and be wholly immune from the consequences when they turned up in innocent hands bearing forged endorsements of the payees' names.

8. In adjudging that through its dealings with the 144 checks during the $2\frac{1}{4}$ years, defendant became an indemnitor of the Government against loss through the issuance of the checks which were not susceptible of genuine endorsements.

9. In adjudging, as inapplicable, the equitable principle that where one of two innocent persons must suffer loss by the wrongdoing of a third person, the one whose fault made the loss possible and facilitated it should bear the loss.

10. In adjudging that the plaintiff, as a matter of equity, is entitled to judgment on the pleadings for the money sued for, with interest and costs.

11. In adjudging that there was no duty devolved upon the Government at any time, and especially either before the issuance or after the redemption of the first check, to promptly uncover Foley's initial fraud so as to prevent its recurrence and repetition 143 times, and in adjudging that the question of the Governments reasonable diligence in this regard is immaterial.

12. In adjudging that defendant was not justified in believing that since no notice had come from the Government regarding the invalidity or forgery of any check, defendant could continue to receive and accredit the checks as genuine ones.

13. In adjudging that the plaintiff is not the author of its own loss.

14. In adjudging that the equities of the plaintiff are superior to the defendant's.

15. In adjudging that the money sued for *ex acquo et bona* belongs to the plaintiff.

16. In adjudging that it would be unconscientious not to require the defendant to return the money even though it paid it over to the forwarding bank years ago and long before the discovery that the checks were bogus.

17. In adjudging that the efficient cause of the loss was not the Government's negligence and carelessness in issuing the checks.

18. In attributing negligence to the defendant and in ignoring plaintiff's negligence.

Summary of Argument.

1. The Stitely case, *supra*, is not a precedent. In the Stitely case the Trust Company dealt with and cashed over 700 checks for the forger Stitely. The Trust Company was the cashing bank and not, as in this case, *an innocent collecting bank*. In this case appellant cashed no checks for the forger and never dealt with him, consequently it is free of negligence. In the Stitely case the element of enrichment was necessarily involved because the Trust Company kept the money it collected from the Government to replenish itself the money it had already paid the forger Stitely. In this case appellant was not enriched because it promptly paid out the collected money to the Anacostia Bank. In the Stitely case the Trust Company acted for itself in endorsing and surrendering the checks and collecting the proceeds. In this case appellant innocently acted for the Anacostia Bank which cashed the checks. In the Stitely case the Trust Company would have been out of pocket the money it paid the forger Stitely unless the Government had redeemed the checks. In this case appellant would have lost nothing as it had not previously paid out anything to the Anacostia Bank. In the Stitely case the Trust Company's position was not changed upon payment of the checks because it kept the money it collected from the Government. In this case appellant's position was changed—it turned the money over as collected to the Anacostia Bank. If material, it might be added that in the Stitely case the crookedness of Stitely occurred outside the walls of the Government and Stitely did not have access to blank Government checks. In this case Foley's crookedness occurred right under the nose of the Government. In the Stitely case ordinary vigilance was nowhere relaxed by the disbursing officers. In this case their vigilance and the vigilance of the administrative bureau were relaxed everywhere along the line.

In the Stitely case seven defenses were pleaded by the Trust Company, but none included the defense of innocence and good faith—there were no facts plead in that case which, according to equitable standards, would deny the Government's right of recovery.

It is true that in the Stitely case, in the "points relied on", the Trust Company invoked the equitable doctrine that—

"Where one of two innocent persons must suffer a loss by reason of the wrongdoing of a third person, the one whose fault made possible the loss should bear it."

But, as shown, that doctrine was clearly inapplicable in that case because the Trust Company, by cashing the checks for Stitely, directly contributed to the success of his forgeries. *That circumstance does not exist in this case.*

In the Government's brief (p. 4) filed in the Stitely case, the Government argued—

"The proximate cause of the loss was the act of the banks in cashing the checks bearing the forged endorsements in reliance upon Stitely, the forger."

But that argument cannot be made in this case because appellant never cashed any checks for Foley.

Neither is the case of *United States v. National Exchange Bank of Providence*, 214 U. S. 302, *infra*, upon which this Court relied in the Stitely case, a precedent. In that case the checks were not issued in contravention of law and no vigilance of the Government was omitted. In that case the Government did not put the checks in the forger's hands but, through no fault of the Government's, they were abstracted by the forger from the mail. Most important, however, is the fact that in that case the issues were framed and the litigation carried on by the Government against the bank which dealt with the forger and cashed the checks for him and enriched itself at the Government's expense. In that case, unless the Government had paid the checks,

the Exchange Bank of Providence would have been out of pocket.

2. In this case the Government, disregarding its own primary responsibility for the surreptitious issuance of the checks, seeks to accomplish what it failed to accomplish in the Chase National Bank case, 252 U. S. 485, *infra*, namely, to hold the bank responsible for the consequences of the dishonesty of a trusted clerk, upon the grounds:

(a) That the bank got no title to the checks owing to the forged payees' endorsement; and that

(b) Therefore the bank gave no consideration for the money it received.

But that is not the test of liability here. It was not the test in the Chase National Bank case where the test was—

Whether the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it. (Atlantic Coast Line RR. Co. v. State of Florida, *infra*.)

Applying that test in the Chase National Bank case, *infra*, Mr. Justice McReynolds, said—

“In order to recover plaintiff must show that the defendant cannot retain the money with good conscience. Both are innocent of intentional fault. * * * He cannot be called upon to pay again and the collecting bank has not received the proceeds of an instrument to which another held a better title. The equities of the drawee who has paid are not superior to those of the innocent collecting bank.”

3. Under the equitable facts and circumstances set up in appellant's answers, the Government is precluded by the exception to Sec. 24, Title 22, 1929 D. C. Code, namely,—

“Unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.”—

from setting up forgery of the payees' signatures as the basis of recovery. It is precluded because—

(a) The checks were drawn and issued in contravention of law.

(b) The checks purported to be what they were not.

(c) The Government, through the issuance of the checks, invited and facilitated the forgeries.

(d) The Government, having issued checks incapable of genuine endorsement, cannot complain of forged endorsements.

(e) The checks, having been conceived in fraud, accomplished the purpose underlying their issuance.

4. The Government cannot recover unless it establishes four affirmative propositions. It must show:

(a) That the equities of the Government are superior to those of appellant.

United States v. Chase Nat'l Bank, 252 U. S. 485, 40 S. Ct. 361, 64 L. Ed. 675, 10 A. L. R. 1401.

(b) That the money was received by appellant in such circumstances that the appellant would give offense to equity and conscience if permitted to retain it.

Atl. Coast Line RR. Co. v. State of Florida, 295 U. S. 301, 309-310, 55 S. Ct. 713, 79 L. Ed. 1451.

Stone v. White, 301 U. S. 532, 57 S. Ct. 851, 81 L. Ed. 1265.

United States v. Chase Nat'l Bank, 252 U. S. 485, *supra*.

(c) That with the means of knowledge all the while at its disposal, if employed, the Government could not have detected the fraud in its incipency and thereby prevented its recurrence.

Leather Mfgs. Bank v. Morgan, 117 U. S. 96, 6 S. Ct. 657, 29 L. Ed. 811.

(d) That irrespective of all equitable considerations, the Government is entitled to recover from a collecting bank the money which, before the discovery of the forgeries, it paid over to the cashing bank.

Nat'l Park Bank v. Seaboard Bank, 114 N. Y. 28, 20 N. E. 632.

Carson v. Federal Reserve Bank, 254 N. Y. 218, 231, 172 N. E. 475.

United States v. American Exchange Bank, 70 Fed. 232.

United States v. Nat'l Exchange Bank of Baltimore, 1 Fed. (2) 888.

Hibbs v. First Nat'l Bank, 133 Va. 94, 106, 112 S. E. 673.

Merchants Bank v. Marine Bank, 3 Gill (Md.) 96, 125.

5. The appellant's answers show:

(a) That the equities of the Government are not superior to those of appellant;

(b) That the money was not received by appellant in such circumstances that the appellant will give offense to equity and conscience if permitted to retain it;

(c) That the Government possessed the means of knowledge all the while, if employed, to detect the fraudulent checks in their incipency; and

(d) That the Government possessed knowledge, if employed, which would have detected the fraud upon the issuance and redemption of the first check and thereby prevented its recurrence.

6. Irrespective of all equitable considerations, the Government is not entitled to recover from appellant because, before the discovery of the forgeries, appellant's position was changed to its prejudice by the payment of the money to the Anacostia Bank.

7. The disbursing officers of the Marine Corps abused their authority and violated the law when they issued the checks to people who were not entitled to them, and the law fastens upon the Government responsibility for the consequences. *Peoples' Bank v. International Finance Corp.*, 30 Fed. (2) 46. *Cooke v. United States*, 91 U. S. 389.

8. The guarantee by appellant of the genuineness of the forged payees' names did not create any liability if none otherwise arose through the receipt of the money. *United States v. Guaranty Trust Co. of New York*, 293 U. S. 340.

Argument.

1. Through this action the Government seeks to recover \$18,060.83 which allegedly was paid by mistake during the

years 1936, 1937 and 1938. The circumstances alleged under which the mistake occurred, were these:

(a) Each check was endorsed with the name of the payee but the signature was in fact false, forged and counterfeit.

(b) The Treasurer of the United States paid appellant the amount of each check.

(c) Each check was endorsed by appellant.

(d) Appellant guaranteed the payee's endorsement on each check.

In stating its case the Government withheld the information pertaining to the origin and history of the checks and dealt only with their incidents—only with what happened at the end of their trail.

The Government's theory, and the basis of its suit, is that the money was paid by mistake because it contends that—

(a) The signatures of the payees were forged.

(b) Appellant did not obtain title to the checks through the forged payees' endorsements, consequently there was no consideration given for the money.

(c) The appellant was unjustly enriched through the receipt of the money.

(d) A quasi-contractual relationship arose, through the receipt of the money and the endorsement and guarantee of the payees' signatures, to return the money.

However, unless a moral obligation arose to return the money, none was created by the guarantee of endorsements. *United States v. Guaranty Trust Co. of New York*, 293 U. S. 340, 55 S. Ct. 221, 79 L. Ed. 415. Besides, as appellant did not negotiate the checks when it surrendered them at the treasury for redemption, the endorsement operated only as a receipt for the money. *Uniform Negotiable Instruments Law*, 1929 D. C. Code, Title 22, s. 41, 96.

The law was established by the Supreme Court in the *Guaranty Trust Co. of New York* case 293 U. S. 340, *supra*, that a bank is not *ipso facto* required to return money to

the Government which was paid through mistake upon a check bearing a forged payee's endorsement, guaranteed as genuine.

2. Since in this type of action, which is essentially an action for money had and received, the Government must recover by virtue of a right measured by equitable standards, it follows that it is open to appellant to state any facts which, according to those standards, would deny the right. *Stone v. White*, 301 U. S. 532, 57 S. Ct. 851, 81 L. Ed. 1265.

Accordingly, in its amended answers, appellant, in effect, stated:

(a) It did not forge the payees' names. They were forged by James H. Foley, a trusted civilian Government clerk who prepared them and to whom the Government delivered them upon their validation.

(b) It received the checks from the Anacostia Bank for collection and remitted the proceeds to that Bank. In doing this appellant acted as a clearing house for the convenience of the cashing Bank and the Government.

(c) It credited the proceeds to the account of the Anacostia Bank as the checks were paid at the treasury.

(d) Long before discovery of the forgeries, it paid the proceeds over to the Anacostia Bank.

(e) It never dealt with the forger.

(f) It was not in anywise enriched through the 144 transactions.

(g) It acted in good faith throughout, is guilty of no negligence and no negligence is attributable to it as a matter of law.

(h) It endorsed the checks and guaranteed the endorsements in reliance upon their integrity and in the belief that they were in all respects what they purported to be.

(i) It endorsed the checks and guaranteed the endorsements in the belief that the payees were their bona fide owners and had capacity to endorse and actually had endorsed.

(j) It was discovered by the Government in 1938, *from means of knowledge all the while in its possession,*

but after the checks had gone their course as valid instruments and were redeemed by the Government as such, that they had been surreptitiously issued, that the payees were fictitious, *i. e.*, ostensible, that the payees were not entitled to them, *and that the checks were not susceptible of genuine endorsement.*

(k) That James H. Foley, a civilian employee of the United States, had fraudulently procured the checks to be issued, fraudulently gained possession of them and forged the payees' names, and cashed or deposited them at the Anacostia Bank.

(l) The Government had the means of knowledge all the while, if employed, to detect the first fraudulent check but it did not employ those means until November 1938, when, within fifteen days, the fraud perpetrated by Foley was unearthed from the records in the Government's possession.

(m) In November, 1938, the Paymaster of the United States Marine Corps ordered an investigation to be made by the administrative board at that headquarters. Learning of this, Foley went to New York where he shot and killed himself.

(n) The issuance of the checks was due to abuse of governmental duty and authority by the administrative board and the disbursing officers of the United States Marine Corps.

(o) In May, 1939, the Secretary of the Navy appointed a board of inquiry to inquire into the dereliction of the accounting officers and disbursing officers of the Marine Corps.

Notwithstanding these equitable considerations, the Government, acting upon the assumption that in all material particulars they were no different from those the Trust Company pleaded and relied on in the Stitely case, filed a motion for judgment on the pleadings and with it a memorandum as follows (R. 31):

"The facts set forth in the complaint and amended answer show that the case is controlled by the decision of the United States Court of Appeals for the District of Columbia in the case of *The Washington Loan & Trust Co., et al. v. United States*, No. 82499, decided March 1, 1943 and cases therein cited."

But are the material pleaded facts alike and the relationships the same? In the Stitely case the Trust Company dealt with and cashed over 700 checks for the forger Stitely. The Trust Company was the cashing bank and not, as in this case, an innocent collecting bank. In this case appellant cashed no checks for the forger and never dealt with him, consequently it is free of negligence. In the Stitely case the element of enrichment was necessarily involved because the Trust Company kept the money it collected from the Government to replenish itself the money it had already paid the forger Stitely. In this case appellant was not enriched because it promptly paid out the collected money to the Anacostia Bank. In the Stitely case the Trust Company acted for itself in endorsing and surrendering the checks and collecting the proceeds. In this case appellant innocently acted for the Anacostia Bank which cashed the checks. In the Stitely case the Trust Company would have been out of pocket the money it paid the forger Stitely unless the Government had redeemed the checks. In this case appellant would have lost nothing as it had not previously paid out anything to the Anacostia Bank. In the Stitely case the Trust Company's position was not changed upon payment of the checks because it kept the money it collected from the Government. In this case appellant's position was changed—it turned the money over as collected to the Anacostia Bank. If material, it might be added that in the Stitely case the crookedness of Stitely occurred outside the walls of the Government and Stitely did not have access to Government checks. In this case Foley's crookedness occurred right under the nose of the Government. In the Stitely case ordinary vigilance was nowhere relaxed by the disbursing officers. In this case their vigilance and the vigilance of the administrative bureau were relaxed everywhere along the line.

In the Stitely case seven defenses were pleaded by the Trust Company, but none included the defense of innocence and good faith—there were no facts in that case which, according to equitable standards, would deny the Government's right of recovery.

It is true that in the Stitely case, in the "points relied on," the Trust Company invoked the equitable doctrine that—

"Where one of two innocent persons must suffer a loss by reason of the wrongdoing of a third person, the one whose fault made possible the loss should bear it."

But, as shown, that doctrine was clearly inapplicable in that case because the Trust Company, by cashing the checks for Stitely, directly contributed to the success of his forgeries. *That circumstance does not exist in this case.*

In the Government's brief (p. 4) filed in the Stitely case, the Government argued—

"The proximate cause of the loss was the act of the banks in cashing the checks bearing the forged endorsements in reliance upon Stitely, the forger."

But that argument cannot be made in this case because appellant never cashed any checks for Foley.

3. In 1920, the case of *United States v. Chase Nat'l Bank, supra*, reached the Supreme Court on appeal by the United States from an adverse decision in 250 Fed. 105. In that case the forger was a finance clerk of the War Department who too had access to blank Government checks. He did exactly what Foley did, except that he took one step more—he also forged the disbursing officer's signature as drawer. The spurious check in that case was discovered in two weeks. Upon possessing himself of the check, the finance clerk cashed it at the Howard National Bank which forwarded it to its correspondent Chase National Bank for collection. The Chase Bank charged the check to the Government's account, forwarded it to the

treasury and credited the proceeds to the account of the Howard National Bank. At that time, Mr. Justice White, who wrote the decision of the Supreme Court in the National Exchange Bank of Providence case, 214 U. S. 302, *supra*, was Chief Justice. The Government relied partially upon *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 87 N. E. 740.

In the Chase National Bank case the check was surreptitiously issued and bore a forged endorsement. The position of the Government in that case was stronger than it is in this because the Chase National Bank was a depository of public funds and hence a contractual relationship *initially* existed between it and the Government.

The Government, in suing the Chase National Bank for restitution, claimed that the money was paid by mistake. It based the demand for recovery upon payment and the forged payee's endorsement. In other words, the Government claimed that it would not have paid the money to the Chase National Bank if it had known that the endorsement was forged. It contended that under the Shawmut Bank case, it was entitled to have the money returned to it. In that case, as in this, the Government sought to hold the Chase Bank civilly responsible for the part it took in the transaction.

In the Government's brief filed in the Supreme Court in the Chase National Bank case, it was earnestly advocated—

“The question whether the plaintiff is entitled to recover in this case must be considered as if this were a suit between plaintiff and the Howard National Bank. There are no greater equities in favor of the defendant than there are in favor of that bank. The defendant claims that because this check was sent to it for collection and deposit to the account of the bank and because defendant, prior to discovery of the forgery, credited the bank with the amount of this

check, notified it of this credit, and paid it various sums in excess of the amount to the credit of the bank with defendant * * * it became a bona fide purchaser of the check for value.”

As the material facts in the Chase National Bank case are remarkably similar to those in this case, they will be mentioned:

(a) The Government dealt direct with the forger. The Chase Bank never dealt with him. The forger was a Government employee.

(b) The forger was allowed free access to blank Government checks.

(c) The same man who wrote the check forged the endorsement and got the money.

(d) The check was drawn to a fictitious (ostensible) payee who did not have capacity to endorse or transmit title.

(e) The check was incapable of a genuine payee's endorsement.

(f) In the forger's hands, the payee's name was predestined to be forged. The forgery of the endorsement was inevitable. That was the purpose of the forger in possessing the check.

(g) The check was not lost by the payee or stolen from him as in the Clearfield Trust Company case, *infra*.

(h) The check carried an affirmation of its verity; that it was in all respects what it purported to be.

(i) The Government made no representation to the Chase Bank regarding the genuineness of the endorsement.

(j) The check, as was calculated, was given full faith and credit by those in whose hands it fell, including the Treasurer of the United States.

(k) Nobody got a legal title to the check or its proceeds. The forged endorsement did not invalidate a valid check.

(l) The Government did not have to pay twice; the forgery affected no payee.

(m) There was no unjust enrichment, no compensation paid and no profit made.

(n) The Chase Bank was an innocent collecting agency caught in midstream.

(o) The Chase Bank paid over the money before the forgery was discovered.

(p) The Government was the author of its own wrongful instrument. It was first in fault.

Deciding the issue, which was: On whose side did equity lie, the Government's or the bank's, the Supreme Court said

“In order to recover, plaintiff must show that the defendant cannot retain the money with good conscience. Both are innocent of intentional fault. * * * He cannot be called upon to pay again, and the collecting bank has not received the proceeds of an instrument to which another held a better title. *The equities of the drawee who has paid are not superior to those of the innocent collecting bank * * *.*” (Italics supplied.)

In composing the differences between the Government and the Chase Bank, the Court, in effect, said—

“Mr. Government you struck the first blow, you initiated the wrong. You unwittingly—or allowed one of your agents to do so wittingly, which makes no difference in the result—put into circulation a check which between the payee and the banks was worthless, but it is good as to you. By that check, Mr. Government, you affirmed that you owed the payee the money it called for and the banks justifiably accredited that affirmation as truthful. The banks having done so Mr. Government, you will not be allowed here to disaffirm that affirmation to their prejudice. The Chase Bank trusted you then and you are precluded from discrediting its good faith now.”

Furthermore, in the Chase Bank case, the Court stated the criterion of liability of a collecting bank for the return of money received on a check bearing a forged payee's signature, when it said—

"If the draft had been a valid instrument, with a good title thereto in some other than the collecting bank, nothing else appearing, the drawee might recover as for money paid under mistake."

And after finding that nobody had a better title to the check than the *innocent* collecting bank, the Court, in denying recovery, said—

" * * * The collecting bank has not received the proceeds of an instrument to which another held a better title. The equities of the drawee who has paid are not superior to those of the innocent collecting bank * * * ."

In rendering that decision, the Supreme Court, of course, was familiar with the equitable principles which ruled that action.

In *Stone v. White*, 301 U. S. 432 *supra*, Mr. Justice Stone (now Chief Justice) said—

"The action * * * although an action at law, is equitable in its function. It is the lineal successor of the common count in *indebitatus assumpsit* for money had and received. Originally an action for the recovery of debt, favored because more convenient and flexible than the common law action of debt, it has been gradually expanded as a medium for recovery upon every form of *quasi-contractual* obligation in which the duty to pay money is imposed by law, independently of contract, express or implied in fact. * * *"

"Its use to recover upon rights equitable in nature to avoid unjust enrichment by the defendant at the expense of the plaintiff, and its control in every case by equitable principles, established by Lord Mansfield in *Moses v. Macferlan* * * * have long been recognized in this Court. (Citations.)"

"Since, in this type of action, the plaintiff must recover by virtue of a right measured by equitable standards, it follows that it is open to the defendant to show any state of facts which, according to those standards, would deny the right." (*Moses v. Macferlan* and other citations.)

Prior to *Stone v. White*, *supra*, Mr. Justice Cardozo, in *Atlantic Coast Line RR. Co. v. State of Florida*, 295 U. S. 301, *supra*, said—

“A cause of action for restitution is a type of the broader cause of action for money had and received a remedy which is equitable in origin and function. *Moses v. Macferlan*. The claimant, to prevail, must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it. The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it. * * * In such cases the simple but comprehensive question is whether the circumstances are such that equitably the defendant should restore to the plaintiff what he has received.”

See also *Keyes v. First Nat'l Bank*, 25 Fed. (2) 684, 688. *Nat'l Bank of Commerce v. Eq. Trust Co.*, 227 Fed. 526, 531. *Hermann v. Gleason*, 126 Fed. (2) 936.

In *People's Bank v. International Finance Corp.*, 30 Fed. (2) 46, (certiorari denied, 279 U. S. 858, 49 S. Ct. 352, 73 L. Ed. 999), it appeared that the bank's cashier abused his authority by issuing certificates of deposit without the bank receiving value therefor. In deciding the case, holding the bank liable on the certificates of deposit, circuit Judge Parker relied in part on the case of *Gleason v. S. A. L. Ry. Co.*, 278 U. S. 349, 49 S. Ct. 161, 73 L. Ed. 415, where Mr. Justice Stone (now Chief Justice) said—

“Undoubtedly formal logic may find something to criticise in a rule which fastens on the principal liability for the acts of his agent, done without the principal's knowledge or consent and to which his own negligence has not contributed. But few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own.”

See also *England Nat'l Bank v. United States*, 282 Fed. 121, 127, where a judgment in favor of the Government was reversed.

The case of *Wells Fargo & Co. v. United States*, 45 Fed. 337, is also pertinent. There the Government issued a check, either in blank or by mistake, for \$1280.22 when it should have been drawn for \$18. Regarding the Government's obligation for the loss, the Court said—

“The loss should fall upon the party that occasioned it; the Government having paid this check to the plaintiff under these circumstances and without any fraud on the part of the plaintiff, it is not entitled to recover or retain the money as against plaintiff.”

4. For practically the same reasons that the *Stitely* case is inapplicable, so is the case of *United States v. Nat'l Exchange Bank of Providence*, 214 U. S. 302, 29 S. Ct. 665, 53 L. Ed. 1006, where the Government did not put the checks in the forger's hands but where they were abstracted by him from the mail *through no fault of the Government*. In this case the Government itself invited and facilitated the forgeries by putting the checks in Foley's hands and by doing that the Government sowed the seed which enabled Foley to reap the harvest. In that case, no ordinary vigilance of the Government was omitted; *the checks were not issued in contravention of law*. In this case the Government's agents, with the evidence of fraud before their eyes, abused and neglected their governmental authority and duty in unlawfully expending public funds through the medium of checks. Most important, however, is the fact that in that case the litigation was carried on by the Government against the bank which dealt directly with the forger—the bank that cashed the checks for him and enriched itself at the Government's expense. In that case, unless the Government had paid the checks the defendant bank would have been out of pocket. *That circumstance does not exist in this case.*

Furthermore, no equitable defenses were interposed in the Nat'l Exchange Bank of Providence case 214 U. S. 302. The Circuit Court of Appeals noted this in its decision, 151 Fed. 402, when it said—

“It is also to be noted that there is no suggestion made before us that either the bank in question here or the United States have been guilty of negligence, except in the particular to which our attention has been brought, namely, an unreasonable delay on the part of the United States in giving notice of the discovery of the false signatures or forgeries.”

5. As the Government was both drawer and drawee of the checks involved in this case, it occupies a dual position, and, in order to recover, it is deferentially submitted, the Government must uphold four affirmative propositions. It must show—

(a) That the equities of the Government are superior to those of appellant.

United States v. Chase Nat'l Bank, 252 U. S. 485, 40 S. Ct. 361, L. Ed. 675, 10 A. L. R. 1401.

(b) That the money was received by appellant in such circumstances that the appellant would give offense to equity and conscience if permitted to retain it.

Atl. Coast Line RR. Co. v. State of Florida, 295 U. S. 301, 309-310, 55 S. Ct. 713, 79 L. Ed. 1451.

United States v. Chase Nat'l Bank, 252 U. S. 485, *supra*.

Stone v. White, 301 U. S. 532, 57 S. Ct. 851, 81 L. Ed. 1265.

(c) That with the means of knowledge at its disposal, if employed, the Government could not have detected the fraud in its incipency and thereby prevented its recurrence.

Leather Mfgs. Bank v. Morgan, 117 U. S. 96, 6 S. Ct. 657, 29 L. Ed. 811.

(d) That irrespective of all equitable considerations, the Government is entitled to recover from a col-

lecting bank the money which, before the discovery of the forgeries, it paid over to the cashing bank.

Nat'l Park Bank v. Seaboard Bank, 114 N. Y. 28, 20 N.E. 632.

Carson v. Federal Reserve Bank, 254 N. Y. 218, 231, 172 N. E. 475.

United States v. American Exchange Bank, 70 Fed. 232.

United States v. Nat'l Exchange Bank of Baltimore, 1 Fed. (2) 888.

Hibbs v. First Nat'l Bank, 133 Va. 94, 106, 112 S. E. 673.

Merchants Bank v. Marine Bank, 3 Gill (Md.) 96, 125.

6. While this action is not founded upon checks but is one for money had and received—money allegedly paid by mistake—nevertheless the Uniform Negotiable Instruments Law plays a part because the action is the outgrowth of the checks.

Sec. 31, Title 22, 1929 D. C. Code, provides—

“Presumption of Valuable Consideration: Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value.”

Sec. 91, same Title, provides—

“Liability of Drawer: The drawer by drawing the instrument, admits the existence of the payee and his then capacity to endorse, and engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored and the necessary proceeding on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent endorser who may be compelled to pay it.
* * *.”

Upon applying the provisions of these sections to the checks in their origin, it may properly be said that the Government, *as drawer*, represented:

- (a) That each was given for value received;
- (b) That the payee of each was the rightful owner thereof;
- (c) That each payee, by endorsement, could pass title; and
- (d) That if the drawee failed to pay, the drawer would.

In other words, in 1936, 1937 and 1938, the Government, as drawer, said:

This check is given the payee for the purpose noted on it—pay or pay-mileage earned. Let anybody trust the payee on my credit; the check belongs to him and he has capacity to endorse. If the drawee dishonors it on presentment you may look to me for payment.

These affirmations being made by the Government of the United States, the following quotation is apposite.

In *Woodruff v. Trafball*, 10 How. 190, 51 S. Ct. 190, 13 L. Ed. 383, the Court said—

“We naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to justice, and a higher morality than belong to the ordinary transactions of individuals.”

Yet, notwithstanding those affirmations, the Government now, six years afterwards, *after the checks have gone their course for its convenience*, been redeemed as its normal valid checks, and all accounts have been settled, says:

You acted at your peril in relying upon my integrity, my admissions, my representations, my affirmations and my engagements. You got no title to the checks because the payees did not endorse them. You must therefore suffer the consequences.

But if Uncle Sam could speak for himself, he would brusquely say something like this:

I am not an opportunist. I, myself, was deceived when I issued the checks. *If the checks had been in all respects what I represented them to be, there would have been no forgeries—no beguilement.* I owe to my people resolute good faith, and in dealing with them the same considerations of morality and right which bind them bind me. My disbursing officers were lulled into

issuing the checks by my dishonest clerk Foley who forfeited his life therefor. Without knowing that the payees were ostensible and could not pass title to the checks by endorsement, I, in order to give them faith, credit and security, vouched for their integrity. In doing this, I represented that the persons named in them had earned them for pay or pay-mileage, and I also represented that the persons named in them were their rightful owners and holders, and as such had capacity to endorse. *Those representations caught the banks off their guard for forgeries.* The appellant, having confidence in my integrity, has become involved in reliance upon my representations which I now find are untrue. Nobody beguiled by my acts shall suffer the consequences.

In *United States v. Willamette Valley & C. M. Wagon-Road Co.*, 54 Fed. 807, a Federal Court said:

“No good reason can be offered why the United States, in dealing with their subjects, should be unaffected by considerations of morality and right which ordinarily bind the conscience. * * * But, when matter of estoppel arises, the observance of honest dealing may become of higher importance than the perservation of the public domain.”

And in *Robinson v. Commissioner of Internal Revenue*, 100 Fed. (2) 847, 849, (certiorari denied, 308 U. S. 567, 60 S. Ct. 81, 84 L. Ed. 476), we find the following pertinent statement of the Court:

“Equitable estoppel in its proper sense imposes its obligations on all transactions and contracts in civilized life. Its purpose is to hold a person to his representations or conduct where otherwise inequitable consequences would result to one, who having a right to do so under all the circumstances of the case, has in good faith relied thereon. It is founded on morality and justice and makes conscience and equity its concern. It is a force within itself and needs neither consideration or legal obligation to support it.”

Our own Uniform Negotiable Instruments law contains a clause which precludes one from disaffirming his initial admissions and affirmations upon which others have acted

to their prejudice. Sec. 24, Title 22, 1929 D. C. Code, provides—

“Where a signature is forged or made without the authority of the person whose signature it purports to be it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.”

The exception—

“unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.”—

seems to fit this case perfectly. It says that one, by his own acts or conduct, may be precluded, both offensively and defensively, from *setting up* forgery or want of authority to sign the payee's name.

The Government is precluded from setting up the forged endorsements as the basis of recovery, because—

(a) The checks were drawn and issued in contravention of law.

(b) The checks purported to be what they were not.

(c) The Government, through the issuance of the checks, invited and facilitated the forgeries.

(d) The government, having issued checks incapable of genuine endorsement, cannot complain of forged endorsements.

(e) The checks, having been conceived in fraud, accomplished the purpose underlying their issuance.

And speaking of commercial paper drawn payable to fictitious payees, Daniel on Negotiable Instruments (1933), Vol. 1, 7th Ed. s. 151, has this to say—

“The law abhors fraud and discountenances the instruments by which it may be committed. For this reason bills and notes payable to fictitious payees are not tolerated, and will never be enforced, save when in the hands of a *bona fide* holder, who received them without knowledge of their true character. The ap-

pearance of a name upon the paper as a payee and endorser is naturally calculated, and has been often used as a means to give it fictitious credit, whereby innocent parties are beguiled into purchasing it. The use of fictitious names in this manner has been highly censured * * *."

7. In *Bend v. Hoyt*, 13 Peters 263, 269, the Supreme Court said—

"The rule has always been, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again."

Therefore if Uncle Sam himself could take a hand in this litigation, he would ask the Government's exponent—

Didn't I in point of "honor and honesty" owe the money on these checks? If so, where are there any morals on my side to which I can conscientiously cling? It seems to me that what that great and just Judge, Lord Mansfield, said nearly two centuries ago, in *Moses v. Macferden*, 2 Burrows 1005, 1012, fits my case, namely:

"This kind of equitable action to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex acquo et bona*, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law; * * *."

Answering Uncle Sam, the exponent replies—

Yes, in "honor and honesty" you owed the money on the checks but you paid them on "false, forged and counterfeit endorsements."

Countering, Uncle Sam says—

I know, but didn't I deceive the appellant first? Didn't I sow the seed which generated the forged endorsements? Let's be honest in work, honest in play and honest in business. When I opened the door for the forger, I let in the forgeries.

Still persisting, the Government's exponent contends—

But, Uncle Sam, you did not make any representations regarding the endorsements. True you sold the berries as sound throughout—they looked all right on the surface—but the banks should have looked beneath the top layer.

But that illogic did not appeal to the Supreme Court in the Chase Nat'l Bank case, *supra*, nor in the Guaranty Trust Co. of New York case, *supra*, where no representation was made by the Government regarding the endorsement of the payees or the title of the checks, and it ought not appeal to this Honorable Court, it is deferentially submitted.

Furthermore, if Uncle Sam could act for himself, he would call in the auditors and accounting officers of Marine Corps headquarters and ask these pertinent questions:

(a) Why did you not employ the means of knowledge, which lay at your feet, before November, 1938, and detect these checks as they were being fraudulently prepared and issued and thereby save me this embarrassment?

(b) You admit, do you not, that if, when the first check was issued and paid, you had then employed the same means which you employed in November, 1938, you would have detected that that check was spurious and fraudulent?

(c) Do you not believe I owed a duty to the public to nip this fraud in its inception and thereby prevent the involvement of banks through the continuous issuance of spurious checks?

(d) Was not appellant justified in believing, since I made no complaint while the checks were being put in circulation, that all of the protective measures against fraud on the public were being properly employed by me?

In *Leather Mfgs. Bank v. Morgan*, 117 U. S. 96, 6 S. Ct. 657, 29 L. Ed. 811, the depositor, Cooper, had in his employ one Berlin who, between September 11, 1880 and February 13, 1881, altered and raised thirteen checks. The trial court directed a verdict against the bank for \$10,741.09, but the

Supreme Court reversed and remanded the case for trial by jury.

It appeared in the Leather Mfgs. Bank case that the depositor's bank account was balanced three times and paid checks returned with it each time while Berlin was altering the checks, but the forgeries or alterations were not discovered by the depositor until March 1881, though he admitted that if on any one of the several balancings he had made the examination of his check book and passbook, as was made in March 1881, he would have easily discovered the alterations or forgeries.

In the Leather Mfgs. Bank case the depositor contended that he owed no duty to the defendant bank to discover and give timely notice of the fact that the checks had been fraudulently altered. But the Court observed that such contention was not consistent with principles of justice.

In deciding the Leather Mfgs. Bank case, Judge Harlan quoted Judge Story, as follows:

"It has the means of knowing if they are genuine; if these means are not employed, it is certainly evidence of a neglect of that duty which the public have a right to require. And in respect to persons equally innocent, where one is bound to know and act upon his knowledge, and the other has no means of knowledge, there seems to be no reason for burdening the latter with any loss in exoneration of the former. There is nothing unconscientious in retaining the sum received from the bank in payment of such notes, which it own acts have deliberately assumed to be genuine. If this doctrine be applicable to ordinary cases, it must apply with greater strength to cases where the forgery has not been detected until after a considerable lapse of time."

Judge Harlan also quoted from the case of *Dana v. Nat'l Bank of Republic*, 132 Mass. 156, thus:

"The plaintiffs owed to the bank the duty of exercising due diligence to give it information that the payment was unauthorized; and this included, not only due diligence in giving notice after knowledge of the

forgery, but also due diligence in discovering it. If the plaintiffs knew of the mistake, or if they had that notice of it which consists in the knowledge of facts which, by the exercise of due care and diligence, will disclose it, they failed in their duty, and adoption of the check and ratification of the payment will be implied. They cannot now require the defendant to correct a mistake to its injury from which it might have protected itself but for the negligence of the plaintiffs. * * *

United States Trust Co. v. David, 36 App. D. C. 549.

Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807.

Nat'l Bank of Commerce v. Tacoma Nat'l Bank, 182 Fed. 1.

American Surety Co. v. Bank of California, 44 Fed. Supp. 81, 84.

First Nat'l Bank of Birmingham v. Allen, 100 Ala. 476, 484, 14 S. 335, 338.

Darling Stores v. Fidelity Bankers Trust Co., 178 Tenn. 165, 176, 156 S. W. 419, 423.

Prudential Ins. Co. v. Nat'l Bank of Commerce, 227 N. Y. 510, 521-522, 125 N. E. 824.

Nat'l Surety Co. v. President, etc., Manhattan Co., 252 N. Y. 247, 169 N. E. 372.

Jarvis v. Manhattan Beach, 148 N. Y. 652, 43 N. E. 68.

See also opinion of Judge Barrett in same case, 6 N. Y. Supp. 703.

In this case the Government had the means of knowing all the while whether the checks were legitimate before their issuance, but it did not employ those means. If it had, the checks would not have been issued. And the Government had the means of knowing that the checks were being unlawfully and surreptitiously issued, but it did not employ those means. If it had, it would have promptly detected the issuance of the first check. Yet the Government now

seeks to require appellant to correct 144 mistakes to its injury, from which the Government could have protected itself but for its negligence. That it cannot do. *Leather Mfg. Bank v. Morgan, supra.*

8. In 1934 the case of *United States v. Guaranty Trust Co. of New York*, 293 U. S. 340, *supra*, reached the Supreme Court. Apparently the case was handled by Mr. Justice Justin Miller who was then Assistant Attorney General. In that case the Supreme Court had before it for decision the case where a Trust Company had *expressly* guaranteed the genuineness of a forged payee's endorsement, and upon collecting the check promptly remitted the proceeds to the cashing bank. *The Government contended that inasmuch as the Trust Company had guaranteed the payee's forged endorsement, it, regardless of all equitable considerations, automatically became legally obligated to return the money.* In that case the check was legitimate in its origin and unless the Government retrieved the paid money it would have paid twice. *Neither of these circumstances of first importance exists in this case.*

In deciding the case against the Government, the Supreme Court concluded that the Trust Company's express guarantee of the forged payee's signature was of no importance if, upon equitable considerations, no moral quasi-contractual obligation arose to return the money—and none such was found to exist. See *Security-First Nat'l Bank v. United States*, 103 Fed. (2) 188, 191.

9. Attention is also invited to the case of *United States v. Nat'l Ex. Bank of Baltimore*, 1 Fed. (2) 888, affirmed 270 U. S. 527, 46 S. Ct. 388, 70 L. Ed. 717. Ex-President Taft was then Chief Justice. Judge Soper was the District Judge and Judge Rose wrote the decision of the Circuit Court of Appeals. In that case a Government check was raised from \$47.50 to \$4750.00. *There was no negligence attributable to the United States.* While the defendant Ex-

change Bank of Baltimore did not deal with the payee of the check, it nevertheless endorsed and *guaranteed all prior endorsements* and collected \$4750.00 from the Government. The defendant Exchange Bank of Baltimore was the intermediate bank—the bank that acted as a clearing agency for the bank that cashed the check for the forger. Brushing aside technicalities, Judge Rose said:

“We do not find it necessary to pass upon these interesting questions * * *, because in our view the plaintiff, having been both the drawer and drawee of the check, may not, in the absence of special circumstances not here existing, recover back the money it has paid to a holder for value not chargeable with negligence or bad faith. (Citation.)”

In that case, as in this, the demand for restitution was not made until after the Exchange Bank of Baltimore had parted with the money it collected from the Government. In support of his decision Judge Rose cited *United States v. Chase National Bank*, 252 U. S. 485, *supra*.

The checks in this case were issued by the disbursing officers while acting within the purview of their authority and in line of their duty, therefore the law fastens upon the Government liability for the consequences of the disbursing officers' abuse of authority and duty in unlawfully issuing checks, in lieu of money, to persons not entitled to receive them.

Early in the history of the Republic, the Supreme Court in *Cooke v. United States*, 91 U. S. 389, 23 L. Ed. 237, said:

“* * * A government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there * * *. Generally, in respect to all the commercial business of the government, if an officer specially charged with the performance of any duty, and authorized to represent the government in

that behalf, neglects that duty, and loss ensues, the government must bear the consequences of his neglect." And in *United States v. Walker*, 139 Fed. 409, (affirmed 148 Fed. 1022) the Court said:

"The underlying principle of all the decisions is that, when the sovereign comes into court to assert a pecuniary demand against a citizen, the court has authority, and is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject, * * * in like subject-matter between man and man. The acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, may in a proper case work an estoppel against the government. The principle that the sovereign is bound by his own acts, and those of his lawfully authorized agents within the purview of their authority, is a wholesome one, and requires the courts to visit an estoppel upon the sovereign in a proper case, where he invokes judicial action."

To the same effect is *State of Iowa v. Carr*, 191 Fed. 257, where the Court said:

"When a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judiciable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances.

"The equitable claims of a state or of the United States appeal to the conscience of a chancellor with the same but with no greater or less force than would those of an individual under like circumstances." (Federal citations.)

10. A word about the case of *United States v. Clearfield Trust Co.*, Vol. 87, p. 524, L. Ed., U. S. Supreme Court Reports, decided March 1, 1943. In that case a government check was *lawfully* issued and drawn upon the Treasury of the United States. It was made payable to the order of Clair A. Barner for WPA services and placed in the mail properly addressed to him at Mackeyville, Pennsylvania. Through no fault whatever of the Government

or the payee, some unknown person abstracted the check, forged the payee's name and cashed it at the store of J. C. Penny & Co. at Clearfield. Penny & Co. deposited the check at the Clearfield Trust Company which, in turn, collected it from the Government. Shortly afterwards Barn-er notified the timekeeper of the WPA Project, where he was employed, that he had not received the check. That check, unlike those involved in this suit, was not a snare and no vigilance of the Government could have forestalled the forgery. That check had a rightful owner and when the Clearfield Trust Company collected the check it received money which belonged to that owner. *That circumstance is not in this case.* Consequently, unless the Government retrieved the money it paid the Clearfield Trust Company, it would have had to pay twice. The rule of recovery applied in that case was aptly stated by the Supreme Court in the Chase National Bank case, 252 U. S. 485, *supra*, when it said:

"If the draft had been a valid instrument, with a good title thereto in some other than the collecting bank, nothing else appearing, the drawee might recover as for money paid under mistake."

Note: In Childs v. Empire Trust Co., 54 Fed. (2) 981, (certiorari denied, 286 U. S. 554, 52 S. Ct. 579, 76 L. Ed. 1289), the Court, speaking of the decision in United States v. National Bank of Commerce, 205 Fed. 433, cited by this Court in the Stitely case, said:

"It is not in accord with the established doctrine and we cannot accept it."

Conclusion.

In this case the Government, disregarding its own primary responsibility for the surreptitious issuance of the checks, seeks to accomplish what it failed to accomplish in the Chase National Bank case, *supra*, namely, to hold

the bank responsible for the consequences of the dishonesty of a trusted clerk, upon the grounds:

(a) That the bank got no title to the checks owing to the forged payees' endorsements; and that

(b) Therefore the bank gave no consideration for the money it received.

But that is not the test of liability here. It was not the test in the Chase National Bank case, 252 U. S. 485, *supra*, where the test was:

Whether the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it. (Atlantic Coast Line RR. Co. v. State of Florida, *supra*).

Applying that test in the Chase National Bank case, 252 U. S. 485, *supra*, Mr. Justice McReynolds said:

"In order to recover, plaintiff must show that the defendant cannot retain the money with good conscience. Both are innocent of intentional fault. * * * He cannot be called upon to pay again, and the collecting bank has not received the proceeds of an instrument to which another held a better title. *The equities of the drawee who has paid are not superior to those of the innocent collecting bank * * *.*" (Italics supplied.)

Accordingly, it is most deferentially submitted that the appealed judgment should be reversed and the District Court directed to dismiss the action.

Respectfully submitted,

GEORGE C. GERTMAN,
American Security Building,
Washington, D. C.
Attorney for Appellant.

APPENDIX.

Case No. 8562.

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APPENDIX.

Case No. 8562.

1 IN THE DISTRICT COURT OF THE
UNITED STATES.

FOR THE DISTRICT OF COLUMBIA.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE NATIONAL METROPOLITAN BANK, A
Corporation, 613—15th Street, N. W.,
Washington, D. C.

Defendant.

Civil Action
No. 16,716.
Filed Aug.
11, 1942.

**Complaint for Recovery of Money Paid on Forged
Endorsements.**

FIRST COUNT

Paragraph 1. The plaintiff, the United States of America, a corporation sovereign, by its attorney, Edward M. Curran, United States Attorney for the District of Columbia, brings this proceeding against the National Metropolitan Bank of Washington, D. C., a corporation engaged in the business of banking in the District of Columbia, and states that defendant owes the plaintiff the sum of Eighteen Thousand, Sixty Dollars and Eighty-three Cents (\$18,060.-83), paid by the plaintiff to the defendant under a mistake of fact, on the dates and under the circumstances hereinafter mentioned.

Paragraph 2. Certain checks, photostatic copies of which are annexed hereto and marked Exhibits A-1 to A-144 inclusive, were drawn on the Treasurer of the United States by officers or agents of the United States duly authorized to draw such checks. Each of said checks was issued and

2 thereafter was endorsed with a signature purporting to be the true and genuine signature of the payee thereof, but said signature was in fact, false, forged and counterfeit.

Paragraph 3. Each check, after said false, forged and counterfeit endorsement had been placed thereon, was endorsed by the defendant and presented by defendant for payment to the Treasurer of the United States at Washington, D. C., which said Treasurer, believing said false, forged and counterfeit endorsement to be the true and genuine signature of the payee named on the face of the check, paid to the defendant the amount thereof. Each of the said checks, so endorsed and so paid, is listed in Exhibit B annexed hereto and incorporated herein according to number, amount and date of payment.

WHEREFORE, the plaintiff demands judgment against the defendant for the amounts so paid by the plaintiff to the defendant on the said checks, in the total amount of Eighteen Thousand, Sixty Dollars and Eighty-three Cents, (\$18,060.83) together with interest on the amounts paid on the said checks at the rate of 6% per annum from date of each payment, as more specifically set out in Exhibit B, besides costs of this suit.

SECOND COUNT

Paragraph 1. And for further complaint, the said plaintiff, the United States of America adopts by reference, and herein incorporates, the averments of Paragraph 2 of the First Count of this action, and states that each check, after said false, forged and counterfeit endorsement had been placed thereon, was endorsed by the defendant, the National Metropolitan Bank of Washington, D. C., a corporation engaged in the business of banking in the District of Columbia in the manner and form set out in Exhibits A-1 to A-144 inclusive, and that the defendant did thereby guarantee the genuineness of the prior endorsements upon the said checks, including the endorsements of the payees named on the face of the said checks; that the

said guaranties were made as part of the said endorsements in order to induce the plaintiff to pay the amounts of the said checks to the defendant; that the defendant presented the said checks for payment to the said Treasurer of the United States at Washington, D. C. which said Treasurer, relying upon the guaranty of the defendant as to the validity of the endorsements upon the said checks, and solely because thereof, paid to the defendant the amounts of the said checks on the dates set out in Exhibit B annexed hereto.

WHEREFORE, the plaintiff demands judgment against the defendant for the amounts so paid by the plaintiff to the defendant on the said checks, in the total amount of Eighteen Thousand, Sixty Dollars and Eighty-three Cents (\$18,060.83), together with interest on the amounts paid on the said checks at the rate of 6% per annum from the date of each payment, besides costs of this case.

EDWARD M. CURRAN,
United States Attorney.

GRACE B. STILES,
*Assistant United States Attorney,
Attorneys for Plaintiff.*

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EXHIBIT B.

Exhibit No.	Check No.	Payee	Amount	Date of Payment
A-1	9,975	C. B. Cates	\$172.60	Jul. 14, 1936
A-2	10,630	C. R. Wallace	96.00	Jul. 27, 1936
A-3	11,255	H. M. Peter	96.00	Aug. 7, 1936
A-4	11,264	C. R. Wallace	131.84	Aug. 11, 1936
A-5	11,375	H. M. Peter	147.50	Aug. 18, 1936
A-6	12,373	C. B. Cates	88.16	Sept. 12, 1936
A-7	12,485	C. R. Wallace	147.50	Sept. 18, 1936
A-8	12,977	C. R. Wallace	131.84	Oct. 8, 1936
A-9	13,467	C. R. Wallace	96.00	Oct. 13, 1936
A-10	14,073	C. B. Cates	96.00	Oct. 22, 1936

Exhibit No.	Check No.	Payee	Amount	Date of Payment
A-11	14,386	H. M. Peter	162.22	Nov. 4, 1936
A-12	15,004	C. R. Wallace	105.76	Nov. 10, 1936
A-13	15,252	C. R. Wallace	131.84	Nov. 18, 1936
A-14	15,392	B. Dubel	96.00	Nov. 23, 1936
A-15	15,610	F. A. Hart	105.76	Nov. 28, 1936
A-16	15,715	B. Dubel	105.76	Nov. 28, 1936
A-17	15,832	C. R. Wallace	96.00	Dec. 9, 1936
A-18	15,921	F. A. Hart	96.00	Dec. 15, 1936
A-19	15,925	C. B. Cates	96.00	Dec. 15, 1936
A-20	16,190	B. Dubel	96.00	Dec. 23, 1936
A-21	16,476	C. R. Wallace	147.50	Dec. 31, 1936
A-22	16,477	C. B. Cates	105.76	Jan. 12, 1937
A-23	16,478	H. M. Peter	147.50	Jan. 6, 1937
A-24	16,479	B. Dubel	105.76	Dec. 31, 1936
A-25	16,942	B. Dubel	96.00	Jan. 14, 1937
A-26	17,140	H. M. Peter	96.00	Jan. 18, 1937
A-27	17,811	F. A. Hart	147.50	Feb. 3, 1937

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A-28	18,180	H. M. Peter	131.84	Feb. 17, 1937
A-29	18,181	C. R. Wallace	96.00	Feb. 17, 1937
A-30	18,256	C. B. Cates	96.00	Feb. 20, 1937
A-31	18,561	B. Dubel	105.76	Mar. 10, 1937
A-32	18,565	C. R. Wallace	105.76	Feb. 27, 1937
A-33	18,928	C. R. Wallace	147.50	Mar. 17, 1937
A-34	18,929	H. M. Peter	147.50	Mar. 17, 1937
A-35	18,989	B. Dubel	96.00	Mar. 17, 1937
A-36	18,990	F. A. Hart	96.00	Mar. 22, 1937
A-37	19,205	C. R. Wallace	105.76	Mar. 29, 1937
A-38	19,340	F. A. Hart	147.50	Apr. 3, 1937
A-39	19,590	C. B. Cates	96.00	Apr. 13, 1937
A-40	19,603	C. R. Wallace	96.00	Apr. 13, 1937
A-41	19,942	H. M. Peter	96.00	Apr. 17, 1937
A-42	20,440	F. A. Hart	96.00	Apr. 27, 1937
A-43	20,656	C. R. Wallace	147.50	May 5, 1937
A-44	20,806	E. W. Snedeker	147.50	May 6, 1937

Exhibit No.	Check No.	Payee	Amount	Date of Payment
A-45	20,955	B. Dubel	96.00	May 17, 1937
A-46	21,024	H. M. Peter	147.50	May 17, 1937
A-47	21,145	W. W. Ashurst	96.00	May 17, 1937
A-48	21,244	C. B. Cates	96.00	June 24, 1937
A-49	21,585	H. M. Peter	131.84	June 7, 1937
A-50	21,774	B. Dubel	96.00	June 12, 1937
A-51	21,846	F. A. Hart	96.00	June 12, 1937
A-52	21,980	E. W. Snedeker	96.00	June 17, 1937
A-53	22,182	H. M. Peter	96.00	June 28, 1937
A-54	22,533	F. A. Hart	240.82	July 6, 1937
A-55	22,778	B. Dubel	172.60	July 14, 1937
A-56	23,375	R. H. Pepper	172.60	July 17, 1937

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A-57	23,675	E. W. Snedeker	96.00	July 24, 1937
A-58	23,864	B. Dubel	96.00	Aug. 4, 1937
A-59	24,150	F. A. Hart	131.04	Aug. 4, 1937
A-60	25,073	H. M. Peter	125.76	Aug. 17, 1937
A-61	25,705	E. W. Snedeker	125.76	Sept. 2, 1937
A-62	25,796	E. W. Snedeker	164.64	Sept. 3, 1937
A-63	26,070	E. W. Snedeker	125.76	Sept. 15, 1937
A-64	26,078	B. Dubel	96.00	Sept. 18, 1937
A-65	26,212	H. M. Peter	147.50	Sept. 23, 1937
A-66	26,491	T. B. Jordan	164.64	Oct. 2, 1937
A-67	26,539	E. W. Snedeker	164.64	Sept. 30, 1937
A-68	26,540	H. M. Peter	131.84	Oct. 6, 1937
A-69	26,665	E. W. Snedeker	96.00	Oct. 11, 1937
A-70	26,772	H. M. Peter	105.76	Oct. 14, 1937
A-71	26,815	W. W. Ashurst	147.50	Oct. 18, 1937
A-72	26,980	B. Dubel	147.50	Oct. 18, 1937
A-73	27,350	E. W. Snedeker	164.64	Oct. 30, 1937
A-74	27,414	E. W. Snedeker	131.84	Nov. 3, 1937
A-75	27,519	E. W. Snedeker	96.00	Nov. 11, 1937
A-76	27,533	H. M. Peter	96.00	Nov. 13, 1937
A-77	27,751	E. W. Snedeker	125.76	Nov. 17, 1937
A-78	27,782	R. H. Pepper	96.00	Nov. 20, 1937

Exhibit No.	Check No.	Payee	Amount	Date of Payment
A-79	27,935	B. Dubel	147.50	Nov. 30, 1937
A-80	28,075	H. M. Peter	164.64	Nov. 30, 1937
A-81	28,333	W. W. Ashurst	96.00	Dec. 10, 1937
A-82	28,341	E. W. Snedeker	96.00	Dec. 10, 1937
A-83	28,531	F. A. Hart	163.48	Dec. 17, 1937
A-84	28,535	B. Dubel	163.48	Dec. 17, 1937
A-85	28,650	E. W. Snedeker	125.76	Dec. 28, 1937

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A-86	28,980	B. Dubel	105.76	Dec. 31, 1937
A-87	28,981	W. W. Ashurst	105.76	Dec. 31, 1937
A-88	28,982	H. M. Peter	164.64	Dec. 31, 1937
A-89	29,222	E. W. Snedeker	131.84	Jan. 14, 1938
A-90	29,390	F. A. Hart	96.00	Jan. 18, 1938
A-91	29,391	B. Dubel	105.76	Jan. 18, 1938
A-92	29,460	R. H. Pepper	96.00	Jan. 22, 1938
A-93	29,465	W. W. Ashurst	96.00	Jan. 22, 1938
A-94	30,288	H. M. Peter	164.64	Jan. 31, 1938
A-95	30,289	E. W. Snedeker	105.76	Feb. 2, 1938
A-96	30,356	R. H. Pepper	105.76	Feb. 7, 1938
A-97	30,480	E. W. Snedeker	125.76	Feb. 11, 1938
A-98	30,655	W. W. Ashurst	147.50	Feb. 15, 1938
A-99	30,792	R. H. Pepper	96.00	Feb. 24, 1938
A-100	31,024	B. Dubel	147.50	Feb. 28, 1938
A-101	31,056	E. W. Snedeker	164.64	Feb. 28, 1938
A-102	31,226	E. W. Snedeker	96.00	Mar. 12, 1938
A-103	31,230	B. Dubel	96.00	Mar. 12, 1938
A-104	31,429	H. M. Peter	147.50	Mar. 16, 1938
A-105	31,430	W. W. Ashurst	96.00	Mar. 16, 1938
A-106	31,586	E. W. Snedeker	147.50	Mar. 26, 1938
A-107	31,844	H. M. Peter	125.76	Apr. 2, 1938
A-108	31,967	B. Dubel	96.28	Apr. 6, 1938
A-109	32,110	E. W. Snedeker	96.00	Apr. 14, 1938
A-110	32,303	R. H. Pepper	96.00	Apr. 18, 1938
A-111	32,308	H. M. Peter	164.64	Apr. 18, 1938
A-112	32,311	E. W. Snedeker	164.64	Apr. 28, 1938

Exhibit No.	Check No.	Payee	Amount	Date of Payment
A-113	32,745	F. A. Hart	163.86	Apr. 30, 1938
A-114	32,749	B. Dubel	163.86	May 3, 1938
8				
A-115	33,112	E. W. Snedeker	96.00	May 18, 1938
A-116	33,620	B. Dubel	147.50	June 4, 1938
A-117	33,932	A. J. Cincotta	162.90	June 13, 1938
A-118	34,139	R. H. Pepper	96.00	June 23, 1938
A-119	34,314	E. W. Snedeker	96.00	June 27, 1938
A-120	34,625	E. W. Snedeker	164.64	July 5, 1938
A-121	34,847	J. H. Berry, Jr.	162.90	July 14, 1938
A-122	34,848	H. S. Wheeler	195.09	July 14, 1938
A-123	686	V. W. Worledge	182.90	Aug. 25, 1938
A-124	709	V. W. Worledge	31.68	Aug. 25, 1938
A-125	806	E. W. Snedeker	96.00	Aug. 26, 1938
A-126	859	James A. Hennessy	120.57	Aug. 31, 1938
A-127	1,114	E. W. Snedeker	164.64	Aug. 31, 1938
A-128	1,242	J. H. Berry, Jr.	162.90	Sept. 10, 1938
A-129	1,243	H. S. Wheeler	187.90	Sept. 10, 1938
A-130	1,575	E. W. Snedeker	96.00	Sept. 17, 1938
A-131	1,737	J. A. Hennessy	120.57	Sept. 26, 1938
A-132	1,754	F. C. Donald	182.90	Sept. 30, 1938
A-133	2,072	E. W. Snedeker	147.50	Oct. 5, 1938
A-134	2,176	G. A. Brace	139.57	Oct. 11, 1938
A-135	2,448	H. M. Peter	147.50	Oct. 15, 1938
A-136	2,450	R. H. Pepper	96.00	Oct. 15, 1938
A-137	2,549	E. W. Snedeker	96.00	Oct. 25, 1938
A-138	2,749	R. H. Pepper	147.50	Oct. 29, 1938
A-139	2,934	G. A. Brace	128.48	Nov. 3, 1938
A-140	2,964	E. W. Snedeker	164.64	Nov. 3, 1938
A-141	3,038	E. W. Snedeker	96.00	Nov. 8, 1938
A-142	3,118	V. W. Worledge	182.90	Nov. 10, 1938
A-143	3,119	James A. Hennessy	120.57	Nov. 16, 1938
A-144	3,333	E. W. Snedeker	147.50	Nov. 16, 1938

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Stipulation.

(Filed June 7, 1943.)

It is stipulated by and between the respective parties hereto that the defendant received notice of demand for the amount claimed by the plaintiff as set forth in the complaint on December 8, 1938.

BERNARD J. LONG,
*Assistant United States Attorney,
Attorney for Plaintiff.*

GEORGE C. GERTMAN,
Attorney for Defendant.

- 10 **Amended Answer of the Defendant the National Metropolitan Bank, a Corporation, 613 15th Street, Northwest, Washington, D. C., to the Complaint Filed Against it in the above Entitled Action.**

(Filed Mar. 5, 1943.)

By permission of the Court, the defendant substitutes this amended answer for the answer it heretofore filed.

1. Defendant admits that the plaintiff is a sovereign corporation but denies that in this type of case it enjoys any rights superior to those of any other suitor. Defendant denies that it owes the United States \$18,060.83 and denies that the United States is equitably entitled to recover that amount, with interest. Defendant says that the plaintiff redeemed the 144 checks over the period from July 14, 1936 to November 16, 1938, and in doing so it paid to defendant the aggregate amount of \$18,060.83 under the circumstances hereinafter related, and not under the circumstances stated in the complaint.

2. Between July 14, 1936 and November 16, 1938 the plaintiff issued, at Marine Headquarters, Washington, D.

C., 144 checks for various amounts (photostatic
 11 copies of the checks are marked Exhibits A-1 to A-144) aggregating \$18,060.83, payable to the order of the marine officers named therein, most of whom were stationed, and whose signatures were known at said Marine Headquarters. These checks, however, were not delivered to the payees themselves but were delivered to James H. Foley, a civilian employee, for delivery to them.

There was nothing about the checks to indicate that they were bogus as they were normal in form, each bore the stamp or seal of the United States, each was signed and validated by an officer of the United States vested with authority to sign checks in its behalf in payment of legitimate obligations. Under Section 31, Title 22, 1929 District of Columbia Code, each check carried the United States warranty that it was issued *bona fide* to each payee for value and had the object typed thereon. And in dealing with and handling these checks, defendant relied upon said warranty.

3. On or about November 21, 1938, the General Accounting Office at Washington, D. C., discovered that Captain James H. Berry, Junior, as payee, was not entitled to the check listed in Schedule B as A-121, No. 34847, of \$162.90, which had been paid to defendant by the plaintiff on July 13, 1938. This discovery led to the further discovery by the plaintiff that all the 144 checks were bogus and that they had been surreptitiously issued and that all bore forged endorsements of the payees' signatures. Thereupon a letter dated November 21, 1938, signed by R. J. Moffett, Acting Comptroller General, calling attention to the discovery was sent to the Major-General Commandant, Marine Corps Headquarters, Washington, D. C., which, in due course, reached the hands of Brigadier-General Russell Putnam, the Paymaster of the United States Marine Corps, Washington, D. C., who, on November 22, 1938, officially ordered the Administrative Section of the Paymaster's
 12 Department of the Marine Corps to make a thorough investigation of the activities in the Marine Corps Depart-

ment of said James H. Foley who was a civil service clerk C.A.F.—4. Upon learning of this ordered investigation Foley went to New York where he killed himself on November 22, 1938.

Upon completing its investigation about December 5, 1938, the Administrative Section aforesaid reported to Paymaster Putnam, *inter alia*, substantially as follows:

- (a) The 144 checks were prepared by James H. Foley.
- (b) The 144 checks were supported by travel or mileage orders and vouchers which Foley forged.
- (c) No money was owing the payees of the checks for the object indicated on them.
- (d) The 144 checks were presented by Foley to the disbursing officers who signed them without verifying the vouchers and documents which supported them.
- (e) No payee of any check ever saw it or received the proceeds.
- (f) No payee of any of the checks contributed to the fraud.
- (g) The 144 checks were delivered by the plaintiff through its disbursing officers or paymaster to James H. Foley for delivery to the payees in the belief that they were lawfully entitled to receive them.
- (h) Foley forged the signatures of the payees upon each check and either cashed or deposited it at The Anacostia Bank, Anacostia, D. C., where Foley maintained a checking account, and received the proceeds which he converted to his own use.

Thereupon, on February 6, 1939, the Acting Comptroller of the United States, I. N. Eliot, wrote the Secretary of the Navy and officially called his attention to the government's loss of \$18,060.83 and the government's neglect which brought it about.

Thereafter, on or about May 1, 1939, pursuant to its appointment by the Secretary of the Navy, a Board of Inquiry was convened at Marine Corps Headquarters, Washington, D. C., for the purpose of "inquiring into the cir-

cumstances and the general activities of James H. Foley who defrauded the United States of \$18,060.83 and the circumstances which made the execution of such fraud possible." The findings of the Board of Inquiry have not been made public.

4. Foley was well known to the paymaster and disbursing officers of the United States Marine Corps at its Headquarters, Washington, D. C., and until November 21, 1938 he enjoyed the highest reputation for honesty and integrity. Owing to this Foley was allowed free access to all blank forms of the Marine Corps, including blank checks of the United States.

5. As the 144 checks were issued and turned over to Foley for delivery, Foley, after first forging the payees' signatures upon them, either cashed or deposited them to his credit at The Anacostia Bank, Anacostia, D. C., where he was favorably known and had carried a checking account for about twelve years.

The Anacostia Bank, having the same faith and confidence in Foley as his superior officers in the Marine Corps, did not question Foley regarding the genuineness of the payees' endorsements but accepted the checks upon the plaintiff's warranty of their genuineness and in the belief that they bore the genuine signatures of the payees.

14 Foley withdrew the proceeds of all the checks deposited to his credit before his forgeries were discovered.

Thereupon, as the checks were cashed or deposited by Foley during the twenty-eight months, The Anacostia Bank endorsed each check and transmitted it to the defendant for collection to its account. Relying upon the plaintiff's aforesaid warranty of their genuineness and believing that they bore the genuine signatures of the payees, defendant, as the checks were received by it from The Anacostia Bank, placed the following printed endorsement on the back of each check:

"Pay to the order of any Bank, Banker or Trust Co.
Prior endorsements guaranteed. National Metropolitan Bank, Washington, D. C."

This endorsement was made through the means of a rubber stamp and it is the same endorsement which defendant uniformly used on all legitimate government checks when presented at the Treasury for payment and redemption. Defendant denies that it used the endorsement "prior endorsements guaranteed" for the purpose or with the object of inducing the United States to pay to it the amounts of the checks. A similar endorsement was first placed upon each check by The Anacostia Bank and, in so doing, that Bank acted in good faith, in ignorance of the forgeries and in the belief that the payees' signatures upon each of the checks was genuine and true. Defendant says that it did not negotiate the checks to the plaintiff when it so endorsed them and that its endorsement amounted to nothing more than a receipt for the proceeds. In any event the endorsement added nothing extra to the normal liability of an endorser of valid negotiable paper. It is denied that the endorsement amounted to a guaranty of the payee's signature. See *United States v. Guaranty Trust Co. of New York*, 293 U. S. 340.

15 Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment applied by the plaintiff to each of the checks that " * * * said Treasurer, believing said false, forged and counterfeit endorsement to be the true and genuine signature of the payee named on the face of the check, paid to the defendant the amount thereof." But defendant says that it is its belief that the Treasurer, in redeeming said checks, paid the money upon each check in the belief that it was issued *bona fide*, was payable to the order of a *bona fide* payee, was given in payment of a lawful obligation and that each bore the genuine endorsement of the payee.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment applied by

the plaintiff to each check that “* * * said Treasurer, relying upon the guaranty of the defendant as to the validity of the endorsements upon the said checks, and solely because thereof, paid to the defendant the amounts of the said checks on the dates set out in Exhibit B annexed hereto.” Defendant says, as aforesaid, that it is its belief that the Treasurer, in redeeming the said checks, paid the money called for by them in the belief that they were issued *bona fide*, to a *bona fide* payee, in payment of a lawful obligation and that each check bore the genuine endorsement of the payee.

Relying upon the plaintiff's warranty of the genuineness of the checks and believing them to bear the genuine signatures of the endorers, and in ignorance of their forgery and of their being bogus in their inception, defendant, as each check was received by it for collection, as aforesaid, presented it to the Treasurer of the United States for payment and redemption and upon collecting the proceeds placed the same upon its books to the credit of The

16 Anacostia Bank, Anacostia, D. C.—the cashing Bank —and thereafter, in the regular course of business, and before the discovery of the forgeries, defendant paid over the proceeds of said checks to said Anacostia Bank. Defendant never received nor did it exact any compensation or profit for its services in that behalf and throughout its dealings with the plaintiff in connection with said checks it acted with the utmost good faith.

Defendant was not informed of the forgeries until some time during the months of November and December, 1938, and until that time defendant was ignorant thereof, as was also The Anacostia Bank. Defendant further says that neither it nor The Anacostia Bank learned that the checks were bogus in their inception and that the government's warranty of their genuineness was untrue until the hearing took place before the Board of Inquiry at Marine Corps Headquarters.

Defendant admits that the plaintiff, upon discovering that it had unwittingly issued the bogus checks which it had warranted as genuine ones and that its employees had forged them, attempted to escape the obligation of its warranty and the result of its neglect in issuing and delivering the checks by shifting from itself to the defendant the responsibility for the loss. In making its demand for restitution upon the defendant, the plaintiff ignored its own unintentional culpability in the creation and negotiation of the checks and the vital fact that it, itself, was the first who dealt with the forger and that it, itself, placed in his hands the means which he used to delude the public and obtain money unlawfully.

6. Defendant says that the plaintiff owes to the public the duty to issue only legitimate checks to legitimate creditors of the government and that if it issues fictitious checks, warranting them to be genuine, equity and
17 fair play require that it should bear the loss.

7. Owing to the confidence reposed in Foley by the officers of the Administrative Section or Division and by the disbursing officers of the Marine Corps Headquarters, and owing to their neglect of duty in failing to check or supervise his work, Foley, on 144 occasions between July 1936 and November 1938, successfully defrauded the United States by obtaining money unlawfully, by the means herein stated, in the aggregate amount of \$18,060.83. In each instance, and in the presence of his superior officers, Foley took four successive steps in natural sequence to accomplish his felonious purpose. In each instance his first step was to fill in available blank travel orders. This involved the forging of not less than four marine officers' names. Using this fictitious and forged document to support the voucher, Foley's next step was to fabricate a fictitious travel or mileage voucher. This also involved the forging of the signature of the ostensible marine officer claimant. Foley's next step, which followed in natural sequence, was to write the check and make it payable to

the order of the ostensible payee for the amount of the spurious voucher and present it to the disbursing officer or paymaster for signature and validation. Sometimes, either before or after the check was validated, Foley would write "pay" in the place of "mileage" upon the check. Without verifying the documents and without making any examination to determine whether the United States owed money to the payees of the checks for the object typed thereon, or otherwise, the disbursing officers or paymaster signed and validated the checks in reliance upon their faith in Foley and delivered them to him for delivery to the ostensible payees. Having thus obtained possession of the means by which to delude the public, Foley's final step was to forge the ostensible payee's signature and

18 after endorsing the check himself, he either cashed or deposited it at The Anacostia Bank.

8. Many years ago the United States Marine Corps, in obedience to the Act of Congress of August 23, 1912, 37 Stat. 375, set up a section or division in the United States Marine Corps Headquarters, Washington, D. C., known as the Administrative Section or Division of the United States Marine Corps, which was specifically charged with the duty of preauditing, examining and checking all accounts and claims against the United States arising in the Marine Corps. Its duties also included the examination and preaudit of all documents such as payrolls, mileage or travel orders, to determine their legitimacy and if they were found genuine and correct it was the duty of this Division to prepare checks for presentation to the disbursing officers or paymaster for their signatures and validation. And being so created to represent and protect the United States and the public from fraud, imposition and loss, the Administrative Section neglected its duty and obligation by allowing and permitting Foley to (1) prepare payroll vouchers and travel and mileage vouchers for marine officers without its supervising, examining, preauditing or checking his work, and (2) write and prepare checks in

payment of officers' pay and officers' mileage and travel expenses without its supervising the same and in violation of its duty.

The said Administrative Section was also specifically charged by law with the duty of post-auditing the accounts of all paymasters and disbursing officers of the Marine Corps before certifying them to the General Accounting Office of the United States for supplemental audit and check; such post-audit involved the inspection, examination and verification of all orders, documents and vouchers which supported the issued checks. Being so charged to
 19 represent and protect the United States and the public from fraud, the Administrative Section neglected its duties to the United States and to the public by failing in its original post-audit to make such examination and inspection as would timely unearth Foley's fraud as it was being committed by him. It is a fact, however, that this Administrative Division or Section, using the files available in the office of the Marine Corps Headquarters, did unearth Foley's fraud and turpitude within fifteen days after it was called to its attention by the General Accounting Office.

9. The disbursing officers and paymaster who signed and validated the checks were specifically charged by law with the duty, before disbursing public funds, of ascertaining whether the United States actually was indebted to the payees of the checks in the amount called for and the object typed thereon. But the disbursing officers and paymaster neglected their duty in this regard. Furthermore, defendant says that plaintiff knew from its records and accounts, if they had been examined beforehand, that it was not indebted to the payees of the checks in the amount or for the object typed thereon or for any other object.

10. In its dealing with these checks defendant believed that they were issued by the government in the regular course of its business; defendant supposed that they were being issued direct to the payees for legitimate purposes

and not to the forger for illegitimate purposes; defendant supposed that each rightful payee obtained possession of the check and rightfully endorsed it. And when the government unintentionally issued these checks and put them in the forger's hands, it deprived the public of the protection which normal legitimate checks carry as a legitimate check must be lost or stolen to suffer a forgery, whereas these checks, being the product of an "inside job," were predestined to be forged.

This is not the case of a suit against a cashing bank whose negligence in cashing the checks would offset the government's neglect in issuing them, but it is a suit against a collecting bank which is not guilty of any negligence contributing to the success of the forgery. The law of the case is ruled in part by *Holley v. Missionary Society*, 180 U. S. 284, and *United States v. Chase National Bank*, 252 U. S. 485.

The case of *United States v. National Exchange Bank of Providence*, 214 U. S. 302, was a suit against the negligent cashing bank.

11. Section 24, Title 22, 1929 District of Columbia Code, being a part of the Negotiable Instrument Statute, provides—

"Where a signature is forged or made without the authority of the person whose signature it purports to be it is wholly inoperative, and no right to redeem the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."

This Statute states the general rule as contended for in this case by the plaintiff. But this Statute also contains an exception to the general rule, which exception the United States disregards but upon which defendant relies.

The exception, as stated in the Statute, is that the general rule applies—

“unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.”

This exception to the general rule springs from the just and equitable principle recognized in all jurisdictions that where one of two innocent persons must bear a loss, it must be borne by the one whose conduct made it possible.

The loss which the plaintiff sustained is traceable direct to the issuance of the checks and placing them in the forger's hands. No bad faith or negligence, traceable to defendant—the collecting Bank—contributed to the payment of the checks or their forgery. The forgery of the checks deprived nobody of title, as would be the case if the checks had been genuine and normal. In paying over the money to the defendant, as the possessor of the checks, the United States redeemed its own spurious paper which it had unwittingly issued and which had entrapped an innocent bank. On the other hand, the United States put the bogus checks into circulation and warranted them as genuine. The United States was the first to contact and deal with the forger, whereas defendant never dealt with him. The checks were not owned by anybody, *i. e.*, nobody had title to them. The United States was the first to repose confidence in Foley and it, itself, put in Foley's hands the instruments which he used to rob the cashing bank. Thereby the United States invited and facilitated the forgeries.

The warranty of the government under Section 31, Title 22 of the 1929 District of Columbia Code, that the checks were issued for a valuable consideration, and its warranty under Section 91 of said Title and Code that the payees of the checks were *bona fide* entitled to them and that they could rightfully endorse the same misled defendant into endorsing and cashing them because it says that if it had known the facts as set up in this answer, it would not have

endorsed nor collected the checks. In representing and warranting to the defendant that these checks were *bona fide* in all respects, and the defendant having acted
22 upon the belief that said warranties were true, plaintiff disarmed it of the protection which the warranties would have carried if true. Defendant says that the initial misrepresentation of the government that these checks were genuine in all respects lulled it into a sense of false security; that if the representations of the government to the public that the checks were genuine in all respects had been true, the checks would have reached the payees' hands in the regular course of business and there would have been no forgeries and no loss.

12. Defendant further says that owing to its confidence reposed in Foley, the United States intrusted and delegated to him power and duty, without his work being checked or supervised by any officials of the Marine Corps Headquarters, to prepare payrolls and mileage or travel vouchers for marine officers and to certify them to the disbursing officers or paymaster for their signatures upon the checks. And to perform this delegated duty the United States made available to Foley the necessary blanks and blank checks. Under this duty it was also Foley's duty, before drawing the checks, to verify all documents supporting the vouchers to determine their authenticity and legitimacy. Under the delegated power and authority it was also Foley's duty to certify the checks, with accompanying vouchers and supporting documents, to the disbursing officers for signature, which he did in these 144 instances. Foley performed this duty faithfully and honestly for many years. While it was the duty of the disbursing officers, before signing the checks, to make an independent examination to determine the legitimacy of the checks, they, owing to the power and duty thus conferred upon Foley, perfunctorily signed the checks in question. The signatures of the disbursing officers upon the checks being routine only, the checks in

question were bearer paper negotiable by delivery.
 23 Paragraph Third of Section 10, Title 22, 1929 District of Columbia Code—being part of the Negotiable Instruments Law.

For the reasons and upon the grounds stated in this answer, defendant says that the aforesaid statutory exception to the general rule applies and that under the facts and circumstances the government is estopped from questioning the genuineness of the employee-forger's endorsement of the ostensible payees' signatures.

Finally, defendant invokes the equitable principle, always applicable as a defense in bar to a suit of this type—money had and received—that—

“Where one or the other of two innocent persons must suffer loss from the fraud or misconduct of a third person, in whose honesty both have reposed confidence, he who first reposes confidence and intrusts him, the third person, with the means by which he may perpetrate the fraud, must bear the loss.”

And having fully answered the complaint, defendant prays that it be dismissed.

GEORGE C. GERTMAN,
Attorney for Defendant,
 American Security Building,
 730—15th Street,
 Washington, D. C.

24 The defendant demands a trial
 by jury.

GEORGE C. GERTMAN,
Attorney for Defendant.

Service of copy of the foregoing Amended Answer acknowledged this 3rd day of March, 1943.

GRACE B. STILES, *Asst. U. S. Atty.,*
Of Counsel for Plaintiff.

**25 Amendment by Defendant to its Amended Answer
Filed March 5, 1943.**

(Filed June 9, 1943.)

By permission of the Court the defendant amends its amended answer as of the date of the filing thereof, by adding thereto the following:

The first check issued, the one for \$172.60 to Lieut. Colonel C. B. Cates, was redeemed by the plaintiff July 14, 1936, but Foley's fraud upon the Government preceded its issuance, documentary evidence of which was of record in the Office of the Marine Corps Headquarters. Foley's fraud, however, was not detected earlier because no supervision was exercised over his work and no preaudit or postaudit of the documents and vouchers supporting the checks was made, though if made the fraud and deceit would have been instantly exposed, as it was two years afterwards when the records and accounts were examined and audited. It was the fraud practiced upon the Government that exposed Foley's rascality; not the fraud and deceit which he practiced upon the cashing bank. The plaintiff, at this late date, wants the defendant to correct its mistake in ac-
26 crediting the Cates and other checks as genuine, but it suggests no reparation for its own culpable negligence, but for which there would have been no forged checks.

After the redemption of the Cates' check the plaintiff was put upon inquiry to ascertain whether the check was genuine and legitimate and to promptly communicate with defendant the result of the inquiry if the check were found to be bogus and the endorsement forged in order that, in subsequent cases, the defendant might not be prejudiced by handling checks bearing Foley's signature. Defendant was justified in assuming that this duty was being performed promptly as the means of knowledge were within the plaintiff's reach. Besides, most if not all of the payees of the checks were detailed at Marine Headquarters and their signatures were well known there. It is true that verifica-

tion of the Cates' check and examination of the accounts, after the check had been redeemed, would not have prevented a legal loss by the plaintiff in that instance; it would, however, have prevented the successful repetition of continuous frauds. Therefore, when the Government continued, as it did, on 143 other occasions to issue spurious checks as genuine ones, it reaffirmed the authenticity of each check. But instead of the Government ascertaining the truth, as these checks were being successively issued and redeemed, it waited until Foley was dead. The loss which the plaintiff has sustained was not the consequence of the forgeries of the payees' names but the consequence of the unlawful issuance of spurious checks as genuine ones. Upon this defense, regardless of other defenses, defendant is entitled to a trial by jury. *Leather Mfg. Bank v. Morgan*, 117 U. S. 96.

GEORGE C. GERTMAN,
Attorney for Defendant.

27 Service of copy of foregoing accepted. No objection to its filing.

BERNARD J. LONG,
*Assistant U. S. Attorney,
Of Counsel for Plaintiff.*

Permission given to file the foregoing amended answer as of March 5, 1943. This amendment was considered by the Court in conjunction with the original amended answer before the entry of judgment in this case upon the plaintiff's motion.

F. DICKENSON LETTS,
Justice.

29 **Motion for Judgment on the Pleadings.**

(Filed Mar. 22, 1943.)

The plaintiff moves the Court as follows:

1. To enter judgment for the plaintiff as prayed for in the compliant upon the pleadings, because from the com-

plaint filed on behalf of the plaintiff, together with the amended answer filed on behalf of the defendant, there is no genuine issue as to any material fact and the plaintiff is entitled to judgment as a matter of law.

EDWARD M. CURRAN,
United States Attorney.

BERNARD J. LONG,
*Assistant United States Attorney,
Attorneys for Plaintiff.*

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- 51 **Order Directing Clerk to Transmit Original Photostatic Copies of Checks, Being Exhibits A-1 to A-144, to the United States Court of Appeals for the District of Columbia, with the Transcript of Record on Appeal.**

(Filed June 15, 1943.)

Upon oral motion of the defendant, it is by the Court this 15th day of June, 1943, ORDERED that in the preparation of the record on the defendant's appeal from the judgment entered in this action on June 9, 1943, the Clerk of the Court shall transmit to the United States Court of Appeals for the District of Columbia, with the record, the original photostatic copies of checks filed with the complaint and marked Exhibits A-1 to A-144.

F. DICKENSON LETTS,
Justice.

Consent given:

BERNARD J. LONG,
Asst. United States Attorney.

-
- 52 **Judgment.**

(Filed June 9, 1943.)

Upon consideration of the motion for judgment on the pleadings filed on behalf of the plaintiff, United States of America, it is by the Court this 9th day of June, 1943,

ORDERED, ADJUDGED and DECREED, That judgment be and the same hereby is entered for the plaintiff in the total sum of \$18,060.83, together with interest at 6% from August 11, 1942 and costs.

F. DICKENSON LETTS,
Justice.

No objection to form:

GEORGE C. GERTMAN,
Attorney for Defendant.

Defendant notes an exception to the above order.

53 | **Order Authorizing Defendant, the National Metropolitan Bank, to Deposit in the Registry of the Court \$22,000.00 in Cash in Lieu of a Supersedeas Bond.**

(Filed June 15, 1943.)

Pursuant to Rule 73 (d) of the Rule of Civil Procedure for the District Courts of the United States, it is by the Court this 15 day of June, 1943, ORDERED that in lieu of the filing of a supersedeas bond in the penalty of \$22,000.00, with surety to be approved by the Court, the defendant is hereby authorized and allowed to deposit in the Registry of the Court the sum of \$22,000.00, and when so deposited the same shall stand accepted in the place of a supersedeas bond in that amount and operate to supersede the execution of the judgment entered in this action pending the final disposition of the defendant's appeal to the United States Court of Appeals for the District of Columbia.

F. DICKENSON LETTS,
Justice.

Consent is hereby given to
the above order:

UNITED STATES OF AMERICA,
By BERNARD J. LONG,
Asst. United States Attorney.

54

Notice of Appeal.

(Filed June 15, 1943.)

Notice is hereby given this 15th day of June, 1943, that the defendant, The National Metropolitan Bank, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 9th day of June, 1943, in favor of the plaintiff against said defendant for \$18,060.83, with interest at 6% from August 11, 1942, and costs.

GEORGE C. GERTMAN,
Attorney for Defendant,
The National Metropolitan Bank.

Acknowledgment is hereby made
 of service of copy of the fore-
 going notice of appeal.

UNITED STATES OF AMERICA,
 By BERNARD J. LONG,
Asst. United States Attorney.

MEMORANDUM.

June 15, 1943.

Copy of Notice of Appeal mailed by Clerk to U. S. Attorney.

Deposit by Gertman into Registry of the Court of \$22,000.00 in cash in lieu of Supersedeas Bond.

55 **Statement of Points on which the Defendant (Appellant) Intends to Rely on its Appeal from the Final Judgment Entered Against it in this Action on June 9, 1943. Pursuant to Rule 12(c) of the Rules of Civil Procedure for the District Courts of the United States.**

(Filed June 15, 1943.)

The District Court, upon the pleadings and the law applicable thereto, erred as follows:

1. In granting the plaintiff's motion for summary judgment on the pleadings.

2. In entering the appealed judgment.

3. In adjudging that under no aspect of the defense is defendant equitably entitled to trial by jury.

4. In adjudging that in equity and justice there is no difference, from the Government's standpoint, between a check issued lawfully for a legitimate purpose to a bona fide payee for value which is lost and forged and a check issued unlawfully for an illegitimate purpose to a fictitious payee and delivered by it into the hands of the forger who forges it.

56 5. In adjudging that though the plaintiff dealt direct with the forger in 144 separate transactions, and it, itself, placed in his hands worthless checks totalling \$18,060.83 as the means with which to successfully carry out his forgeries to fruition, the good faith and innocence of the defendant which never dealt with nor contacted the forger, may be disregarded as immaterial.

6. In adjudging that defendant must pay the Government \$18,060.83 and about \$1,000.00 interest, besides costs, because it innocently turned in, bearing forged payees' endorsements, the 144 checks which the Government years ago issued contrary to prohibition of statutory law in payment of nonexistent obligations, and which it actually placed in the hands of the forger who forged the endorsements.

7. In adjudging that the Government may issue 144 checks contrary to prohibition of statutory law, make them payable to fictitious payees presumably in payment of existing obligations, put them in circulation by placing them in the forger's hands, and be wholly immune from the consequences when they turned up in innocent hands bearing forged endorsements of the payees' names.

8. In adjudging that through its dealings with the 144 checks during the 2¼ years, defendant became an indemnitor of the Government against loss through the issuance of the checks which were not susceptible of genuine endorsements.

9. In adjudging, as inapplicable, the equitable principle that where one of two innocent persons must suffer loss by the wrongdoing of a third person, the one whose fault made the loss possible and facilitated it should bear the loss.

57 10. In adjudging that the plaintiff, as a matter of equity, is entitled to judgment on the pleadings for the money sued for, with interest and costs.

11. In adjudging that there was no duty devolved upon the Government at any time, and especially either before the issuance or after the redemption of the first check, to promptly uncover Foley's initial fraud so as to prevent its recurrence and repetition 143 times, and in adjudging that the question of the Government's reasonable diligence in this regard is immaterial.

12. In adjudging that defendant was not justified in believing that since no notice had come from the Government regarding the invalidity or forgery of any check, defendant could continue to receive and accredit the checks as genuine ones.

13. In adjudging that the plaintiff is not the author of its own loss.

14. In adjudging that the equities of the plaintiff are superior to the defendant's.

15. In adjudging that the money sued for *ex acquo et bona* belongs to the plaintiff.

16. In adjudging that it would be unconscientious not to require the defendant to return the money even though it paid it over to the forwarding bank years ago and long before the discovery that the checks were bogus.

17. In adjudging that the efficient cause of the loss was not the Government's negligence and carelessness in issuing the checks.

58 18. In attributing negligence to the defendant and in ignoring plaintiff's negligence.

Dated, June 15, 1943.

GEORGE C. GERTMAN,
Attorney for Defendant.

Service of copy of the foregoing points and authorities acknowledged this 15 day of June, 1943.

BERNARD J. LONG,
Asst. United States Attorney.

59

Designation of Record.

(Filed June 15, 1943.)

Pursuant to Rule 75 (f) of the Rules of Civil Procedure for the District Courts of the United States, it is hereby stipulated and agreed between the parties that the following shall constitute the record on appeal from the judgment entered in this action against the defendant on June 9, 1943:

1. The complaint with Exhibit B, and the date of the filing thereof. Also stipulation as to amendment of the complaint filed June 7, 1943. Also the original photostatic copies of Exhibits A-1 to A-144 filed with the complaint. Counsel will obtain an order of the Court directing that the original photostatic copies of Exhibits A-1 to A-144 now on file be transmitted with the record but counsel agree that Exhibits A-1 to A-144 are not to be included in the appendix to appellant's brief or printed in the Court of Appeals.

2. Defendant's amended answer and the date of filing. Also, with it and as a part thereof, the amendment to the defendant's answer filed June 9, 1943, with copy of the District Court's order written thereon.

60 3. Plaintiff's motion for judgment on the pleadings and the date of filing.

4. Defendant's reply and points and authorities, and the date of the filing thereof, in opposition to the plaintiff's motion for judgment on the pleadings. It is agreed that owing to its length this need not be printed in the appellant's appendix to its brief.

5. Order of the Court on June 15, 1943, directing the Clerk of the Court to transmit with the record on appeal the original photostatic copies of the checks involved, being Exhibits A-1 to A-144, both inclusive.

6. Copy of the minute entry, and date thereof, of the judgment entered by the Court against the defendant on June 9, 1943, on the plaintiff's motion. Let this entry also show that the defendant noted an exception to the entry of the judgment.

7. Copy of the order of the Court of June 15, 1943 authorizing the defendant to deposit in the Registry of the Court \$22,000.00 cash in lieu of the filing of a supersedeas bond.

8. Memorandum of the Clerk of the District Court showing the deposit of \$22,000.00 in the Registry of the Court, and the date of the deposit thereof.

9. Defendant's notice of appeal from the judgment entered against it on June 9, 1943, and date of filing thereof.

10. Copy of appeal and memorandum or certificate of the Clerk of the District Court showing date of his mailing or serving upon plaintiff's counsel of copy of notice of defendant's appeal.

61 11. Copy of defendant's points relied on on appeal and date of its filing, and acknowledgment by plaintiff of service of copy thereof.

12. Copy of this agreed designation of record.

This stipulation entered into this 15 day of June, 1943.

UNITED STATES OF AMERICA,

Plaintiff,

By BERNARD J. LONG,

Asst. United States Attorney.

THE NATIONAL METROPOLITAN BANK,

Defendant,

By GEORGE C. GERTMAN,

Its Attorney.

FILED JAN 4 1944

Joseph W. Stewart

BRIEF FOR THE UNITED STATES, APPELLEE CLERK

IN THE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 8562

NATIONAL METROPOLITAN BANK, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM A JUDGMENT OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF COLUMBIA

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MEMORANDUM FOR THE RECORD

DATE: 10/10/54

SUBJECT: [Illegible]

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IN THE
United States Court of Appeals
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No. 8562

NATIONAL METROPOLITAN BANK, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT OF
THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES, APPELLEE

QUESTION PRESENTED

Appellant's brief discloses that a single basic question is presented by the action of the court below in entering judgment for the plaintiff on the pleadings:

Whether the rule announced by this Court in *Washington Loan & Trust Co. v. United States*, 134 F. (2d) 59 (decided March 1, 1943), was properly applied to this case where the defendant, a collecting bank acting on behalf of a correspondent, guaranteed all prior endorsements in writing.

COUNTER-STATEMENT OF THE CASE

This is an appeal by the National Metropolitan Bank, defendant below, from a judgment for the plaintiff on the pleadings entered without opinion by the District Court, Honorable F. Dickenson Letts, Justice. Judgment was entered June 9, 1943, and notice of appeal filed June 15, 1943.

On August 11, 1942, the United States, appellee in this Court, filed a civil action to recover the sum of \$18,060.83 paid

to the appellant by the Treasurer of the United States upon presentation of 144 checks bearing appellant's guarantees of prior endorsements preceded by forged endorsements of the signatures of the payees named in the checks. The complaint was in two counts, one for recovery of money paid under mistake, the other for breach of the written guarantees (Appt.'s Appx. 1-7). Appellant answered generally, admitting the allegations of the complaint but pleading want of sufficient information to admit or deny that the Treasurer had paid the checks in reliance upon its guarantees of prior endorsements (Appt.'s Appx. 8-12). The answer alleged further facts in detail, but pleaded that in stamping the checks with its guarantee of prior endorsements and collecting their proceeds, appellant "did not negotiate the checks to the plaintiff" and that "its endorsement amounted to nothing more than a receipt for the proceeds" which "added nothing extra to the normal liability." It also pleaded that under section 23 of the Uniform Negotiable Instruments Law (D. C. Code, 1940, sec. 28-124) the United States was precluded from asserting the forgeries both because of negligence in issuing the checks and in not discovering from its records that the entire series of transactions were fraudulent and because of the effect of sections 24 and 61 of the Negotiable Instruments Law (D. C. Code, 1940, secs. 28-201 and 28-502)¹ (Appt.'s Appx. 9, 14-16, 21). The United States moved for judgment on the pleadings on the ground that no genuine issue existed as to any material fact and that the decision of this Court in the case of *Washington Loan & Trust Co. v. United States* (No. 82499, decided March 1, 1943) was controlling as a matter of law (R. 29-31, Appt.'s Appx. 22, and Br. 17). The Government's motion was granted and judgment entered against appellant for the amounts of the checks with interest and costs (Appt.'s Appx. 23-24).

The principal allegations of fact may be summarized from the pleadings as follows: James H. Foley was a civilian clerk in the office of the Paymaster, United States Marine Corps Head-

¹ "SEC. 24. *Presumption of Consideration.*—Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; * * *

"SEC. 61. *Liability of Drawer.*—The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; * * *

quarters, Washington, D. C., and was assigned to prepare officers' pay and mileage vouchers, to prepare checks in payment thereof, present the checks for signature by the paymaster or certain other disbursing officers duly authorized to draw checks on the Treasurer of the United States, and to deliver the signed checks to the named payees (Appt.'s Appx. 10, 15-16, 19). From time to time during a period of twenty-eight months, beginning shortly before July 13, 1936, and ending November 14, 1938. Foley forged pay and travel-mileage vouchers, together with any necessary supporting travel orders, and prepared 144 checks on the Treasurer of the United States for payment of the amounts of the forged vouchers. The checks and vouchers were payable to one or another of sixteen actually existing Marine Corps officers, most of whom were stationed at Washington, D. C., and none of whom was entitled to the proceeds of any of the checks or had any knowledge of the fraud (Appt.'s Appx. 9-11). Foley took the checks, vouchers, and orders he thus prepared and, without their being subjected to any intervening administrative examination, presented them to the paymaster or other authorized disbursing officers who completed the checks by adding their signatures as drawers. The paymaster and disbursing officers were unaware of the fraud but, relying exclusively on Foley's established reputation for honesty and integrity, completed the checks by signature in good faith without verifying the vouchers and supporting documents.

The signed checks with the vouchers and orders were then returned to Foley for filing and distribution. Foley did not deliver the checks to any of the sixteen officers named as payees, however, but forged their signatures as endorsements, added his own name as second endorser and cashed or deposited the checks with the Anacostia Bank of Anacostia, D. C. (Appt's Appx. 14-15). The Anacostia Bank made no investigation of the genuineness of the payees' signatures but took the checks in reliance upon their faith and confidence in their depositor Foley. As the Anacostia Bank received the checks from Foley it stamped them with the endorsement, "Pay to the order of any Bank, Banker, or Trust Co. Prior endorsements guar-

anteed," and transmitted them to appellant for collection. Appellant in turn took each check and presented it to the Treasurer of the United States stamped with the words—

Pay to the order of any Bank, Banker, or Trust Co.
Prior endorsements guaranteed. National Metropolitan Bank, Washington, D. C.

and received payment of the several amounts. It credited the collections to the Anacostia Bank and in the regular course of business paid over the proceeds prior to the discovery of the forgeries in November 1938 and the Government's formal demand for repayment on December 8, 1938 (Appt's Appx. 9, 11-13).

CONTESTED ISSUES

Judgment for the plaintiff having been entered on the pleadings pursuant to motion, all facts well pleaded by either party and not denied must be taken as admitted, together with all inferences reasonably to be drawn, but not the legal conclusions of the parties. No dispute is therefore raised as to the facts. Appellant's correspondent took the word of a thief and forger, paid him the money and sent the checks to appellant who collected from the Treasurer after personally guaranteeing all endorsements. On these facts appellant seeks to raise the following issues of law:

1. Whether under the circumstances here involved the *Washington Loan & Trust Company* case is dispositive of the rights of the parties.
2. Whether appellant's payment over to its correspondent before notice of the forgeries relieved it of liability.
3. Whether appellant's written guarantees of prior endorsements added to its obligation.

Appellant contends it is only a collecting bank and recovery can be had only if in equity and good conscience it has been unjustly enriched by the payments and not for loss by breach of guarantee or warranty of endorsements. It urges the decision of this Court in the *Washington Trust Company* case and that of the Supreme Court in *United States v. National Exchange Bank of Providence* (1909), 214 U. S. 302, are not applicable and that payment over prior to notice of the forgeries is a complete defense. It further urges that as a collecting bank

acting for a correspondent it did not warrant title nor did its written guarantees of prior endorsements render it liable. The United States submit that the *Washington Loan & Trust Company* decision is fully dispositive of this appeal, that in the circumstances payment over is no defense to liability for breach of appellant's personal written guarantees and that in all events the warranty implied from presentation of the checks for payment under unrestrictive endorsements made appellant liable for its want of valid title.

SUMMARY OF ARGUMENT

I

Since the decision of this Court in *Washington Loan & Trust Co. v. United States*, — App. D. C. —, 134 F. (2) 59, decided March 1, 1943, no controversy can exist in respect of the fact that the United States may recover from a presenting bank, whether collecting for a correspondent or for itself, which guarantees the genuineness of prior endorsements where the endorsements of the payees were forged by a government employee who through negligent supervision procured the checks to be issued with the intention of abstracting them and obtaining their proceeds. Here the guarantees of endorsements were given by appellant and payment obtained in accordance with the customary practice regarding payment through banking channels. Accordingly, the endorsements of the payees named in the checks having been forged, appellant is liable for the breach of its contracts of guarantee. Appellant seeks to escape this liability, however, by contending that as a collecting bank acting on behalf of a correspondent it was a mere innocent third party and recovery can be had only if it can be shown to have been at fault and cannot in equity and good conscience retain the money. Appellant urges various distinctions and authorities dealing with other special situations in an attempt to invoke the application of the rule that as between two innocent persons he who has made possible a loss must bear it. The United States contends that every material consideration now urged by appellant was examined and rejected by this Court in the *Washington Loan & Trust Company* case and that the rule there announced, holding the presenting bank liable on its

personal guarantee of endorsements, is fully dispositive of appellant's liability here even though it acted only as agent for a correspondent and no longer had the funds in its possession when the forgeries were discovered.

II

Appellant's payment over to its correspondent before notice of the forgeries had no effect on the right of the United States to recover the loss it sustained by the breach of appellant's personal written guarantees of prior endorsements and its implied representations and warranties that it had valid title to receive the proceeds of the checks in its own behalf. The decision of this Court in *District National Bank v. Washington Loan & Trust Co.* (1933), 62 App. D. C. 198, 65 F. (2d) 831, 833, establishes that the drawee may rely on the presenting bank's personal written guarantee without investigation. The absolute and unconditional language of appellant's guarantees is confirmed by the history of the requirement of a guarantee by the presenting bank. Customary banking practice insists on such personal guarantees of prior endorsements from the presenter precisely because drawees are ordinarily unwilling to make payment to another bank through the intermediary of an irresponsible agent. Even aside from its personal written guarantees, however, in view of appellant's failure to disclose its agency when collecting under an unrestricted endorsement, its presentation of the checks for payment constituted an implied representation and warranty that it was owner of the valid title to the checks, and for breach of this implied warranty appellant is as fully liable to the United States as for breach of its written guarantees.

ARGUMENT

I

The Washington Loan & Trust Company case is fully dispositive of this appeal and no reason exists for departing from that decision

This Court in *Washington Loan & Trust Co. v. United States* (1943), — App. D. C. —, 134 F. (2d) 59, held that when the signature of the payee of a government check is forged, the

presenting bank which guarantees the genuineness of prior endorsements is not relieved from liability by negligence of the agents of the United States in issuing the check and in not promptly detecting the fraud. In that case pay-roll checks bearing forged endorsements of the payees were deposited and cashed with the Washington Loan & Trust Company. In some instances the Trust company presented the checks directly to the Treasurer of the United States and collected the proceeds. In others it forwarded them to the Columbia National Bank of Washington, which presented them to the Treasurer and collected on the Trust company's behalf. In each instance, however, the bank presenting the check for payment gave the personal guarantee of prior endorsements customary in such cases (134 F. (2d) at 60). Years later it was discovered that a government employee by negligent supervision had fraudulently procured the checks to be drawn and issued by authorized government disbursing officers unknowingly to fictitious payees; had abstracted the checks after signature; forged the payees' endorsements and obtained the proceeds by cashing and depositing the checks with the Trust company. The United States brought suit for recovery, and the presenting banks attempted to defend on the ground that where one of two innocent persons must suffer for a loss caused by a third, the one making it possible should in equity and good conscience be required to bear it. The District Court, however, held negligence immaterial (47 F. Supp. 25, 28) and gave judgment for the amounts of the checks collected by each defendant from the Treasurer. The defendants separately appealed (134 F. (2d) at 59) and this Court affirmed as to both the Columbia bank, which had merely collected on behalf of the Trust company, and as to the Trust company and another bank which had collected on their own behalf.

This Court made no distinction in liability between the Columbia bank, which had collected for its correspondent, the Trust company, and the other banks which collected as owners of the checks which they presented. The opinion of Chief Justice Groner declares that the Government owes no duty to presenting banks in respect of endorsements and made no representations concerning the verity of the endorsements nor the title of the holders, but that, on the other hand, the banks by

taking the paper assumed a duty to determine at their peril the genuineness of the endorsements and received and collected the checks solely on their own belief in the apparent genuineness of the endorsements and in the responsibility of the holder of the checks (134 F. (2d) at 61). The decision was rested on the case of *United States v. National Exchange Bank of Providence* (1909), 214 U. S. 302, and applied the principles declared by District Judge Sibley in *Insurance Co. v. Fourth National Bank* (1926, N. D. Ga.), 12 F. (2d) 100. The leading federal cases of *Fulton National Bank v. United States* (1939, C. C. A. 5), 107 F. (2d) 86, and *Farmers State Bank v. United States* (1932, C. C. A. 5), 62 F. (2d) 178, as well as numerous state court cases were also cited and relied on.²

It would seem, therefore, that no difference could exist between the liability of the Columbia bank there and that of appellant here and that the *Washington Trust Company* case is accordingly dispositive of this appeal. Appellant points out, however, that this Court's opinion treated the entire matter from the standpoint of the Trust company, which was cashing as well as presenting bank, and it now urges this Court to reexamine the liability of appellant, as a mere collecting bank, in the light of certain distinctions (Appt.'s Br. 10-11, 18-19) and certain additional authorities (Appt.'s Br. 12-13, 15-17, 19 et seq.) which, it contends, establish that in order to recover from a presenting bank which has only collected for a correspondent it must be shown that the collecting bank was at fault and cannot in equity and good conscience retain the money. The United States submits, however, that this Court fully considered the entire matter in the *Washington Trust Company* case and no reason exists for departing from

² Other leading federal cases holding negligence no defense to recovery by the drawee from the presenting bank are *District National Bank v. Washington Loan & Trust Co.* (1933), 62 App. D. C. 198, 65 F. (2d) 831, 833; *City Bank v. Hamilton National Bank* (1939), 71 App. D. C. 225, 108 F. (2d) 588; *Security Savings Bank v. First National Bank* (1939, C. C. A. 6), 106 F. (2d) 542, 544; *Onondaga County Savings Bank v. United States* (1894, C. C. A. 2), 64 Fed. 703. Cf. *National Metropolitan Bank v. Realty Appraisal & Title Co.* (1931), 60 App. D. C. 86, 47 F. (2d) 982, and *Continental National Bank & Trust Co. v. Olney National Bank* (1929, C. C. A. 7), 33 F. (2d) 437, 438-439, applying the rule to actions by drawer against drawee.

the rule there established. It believes appellant's distinctions are inconsequential and its authorities inapplicable to the facts here involved.

1. *The distinctions appellant relies on are inconsequential.*—Appellant contends that neither the *Washington Trust Company* case nor the *Exchange Bank of Providence* case are applicable here because the equitable defenses of payment over and of innocence and good faith were not there available to the presenting banks because they were regarded as cashing rather than collecting banks, and because the federal statutes and regulations concerning administrative examination of vouchers were not there violated nor the forger entrusted to prepare the checks for the drawer's signature (Appt.'s Br. 18-19, 25-26).

Appellant's attempted distinction that the equitable defenses of payment over before notice and of innocence and good faith were not available in the *Washington Trust Company* case overlooks the statement of facts in the opinion of Chief Justice Groner. As pointed out, the Columbia National Bank there, like appellant here, was a mere collecting bank. All equitable defenses were urged generally on this Court by each defendant including the Columbia bank, in separate appeals. This Court none the less held the Columbia bank equally as liable for the proceeds of the checks which it presented on behalf of the Trust company as the other banks were for the proceeds of those they had presented as owners. Moreover, in *Clearfield Trust Co. v. United States* (1943), 318 U. S. 363, the Supreme Court itself applied the same rule, as announced in the *Exchange Bank of Providence* case, to a presenting bank expressly stated in the opinion to have been merely collecting for a depositor. Defendant there had accepted the check as agent for collection and received payment from the Treasurer after giving the customary written guarantee of prior endorsements (318 U. S. at 365). Without discussion the Supreme Court allowed the United States to recover from the defendant collecting bank on its written guarantee.³

³ No other result seems possible in the federal courts since the law merchant rule obtains and the basis of a presenting bank's liability is not possession of the funds nor negligence or other fault but the breach of its express guarantee or implied warranty of title. *Leather Manufacturers Bank v. Merchants Bank* (1888), 128 U. S. 28, 34-35; *United States v.*

Appellant's reference to the violation in the present case of applicable statutes and regulations concerning Government fiscal procedure affords no more substantial distinction.. The identical statute and substantially similar regulations were applicable in the *Washington Trust Company* case (cf. 134 F. (2d) at 60) and just as apparently were violated by the government agents involved. Moreover, under well accepted principles such statutes and regulations are for the Government's exclusive protection and impose no duty for the benefit of parties dealing with government agents.⁴ Their observance may not be relied upon by a presenting bank or any other third party (*United States v. National Exchange Bank of Providence*, 214 U. S. at 318-319). The circumstance that in the present case the forger was assigned, unwisely it now appears, both to prepare the vouchers and also to make out the checks for signature and afterwards deliver them, fails equally of supplying appellant with a significant distinction or of making the checks payable to bearer. A clerk, in filling up a check form to the order of a named payee before signature or in delivering the signed check to someone other than the payee intended by the signer, does not thereby become "the person making it so payable" as the expression is used in section 9 (3)

National Exchange Bank of Providence (1909), 214 U. S. 302, 315-316; *District National Bank v. Washington Loan & Trust Co.* (1933), 62 App. D. C. 198, 65 F. (2d) 831, 833. See *Hartford-Connecticut Trust Co. v. Riverside Trust Co.* (1938), 123 Conn. 616, 197 Atl. 766, 770, expressly holding payment over no defense, and *United States v. Canal Bank & Trust Co.* (1939, E. D. La.) 29 F. Supp. 605, allowing judgment jointly against both collecting bank and remitter. In *American Exchange National Bank v. Yorkville Bank* (1924), 122 Misc. 616, 204 N. Y. S. 621, 627, aff'd by mem. 210 App. Div. 885, 206 N. Y. S. 879, the point is briefly discussed. See also *First National Bank v. City National Bank* (1902), 182 Mass. 130, 65 N. E. 24; *Merchants' Bank v. McIntyre* (1849), 2 Sandf. (4 N. Y. Super. Ct.) 431, 432, and 435.

⁴See *United States v. Kirkpatrick* (1824), 9 Wheat. 720, 736-737; *United States v. Van Zandt* (1826), 11 Wheat. 184, 190; *Dox v. Postmaster General* (1828), 1 Pet. 318, 325; *Onondaga County Savings Bank v. United States* (1894, C. C. A. 2), 64 Fed. 703, 704-705. The same rule is applied respecting similar regulations of private organizations. *Grand Lodge v. State Bank* (1914), 92 Kans. 876, 142 Pac. 974, 977; *Scott v. First National Bank* (1938), 343 Mo. 77, 119 S. W. (2d) 929, 939; *Jordan Marsh Co. v. National Shawmut Bank* (1909), 201 Mass. 397, 87 N. E. 740.

of the Negotiable Instruments Law (D. C. Code, 1940, sec. 28-110) so as to make the paper payable to bearer. The law is settled that only the disbursing officer who signs as drawer is the person "making the check payable" within the meaning of the statute and it is his acts and intentions alone which irrevocably bind his employer.⁵ Indeed several of the cases which this Court cited with approval in the *Washington Trust Company* case involved checks filled out by the defrauding clerk (see esp. *Welsh v. German American Bank* (1878), 73 N. Y. 424, 29 Am. Rep. 175; *United States Storage Co. v. Central Bank* (1931), 343 Ill. 503, 175 N. E. 825, 826; cf. *National Surety Co. v. National City Bank* (1918), 184 App. Div. 771, 172 N. Y. S. 413) while *American Sash & Door Co. v. Commerce Trust Co.* (1932), 332 Mo. 98, 56 S. W. (2d), 1034, 1042, expressly rejected the view that the person delivering the checks "made them payable" within the meaning of the Act.

2. *The authorities appellant relies on are inapplicable to the facts of the present case.*—Appellant contends certain authorities which it cites establish the general principle that recovery from a collecting bank can be had only if it be shown that the

⁵ Cf. *Continental National Bank & Trust Co. v. Olney National Bank* (1929, C. C. A. 7), 33 F. (2d) 437, 439. Cases like *People's Bank v. International Finance Corp.* (1929, C. C. A. 4), 30 F. (2d) 46, cert. den. 279 U. S. 858, and *Childs v. Empire Trust Co.* (1932, C. C. A. 2) 54 F. (2d), 981, cert. den. 286 U. S. 554 (cited, Appt.'s Br. 14, 24, 38), are applications of this rule and have no bearing on this case where the disbursing officers were deceived. In the *Washington Trust Company* case (134 F. (2d) at 63), this Court expressly distinguished *Hartford Accident & Indemnity Co. v. Fifth-Third Union Trust Co.* (1938, S. C. Ohio), 23 F. Supp. 53, and other cases of this type. Beutel, *Brannan's Negotiable Instruments Law* (6th ed. 1938), p. 207-208, suggests the cases present two problems: "(1) Must the knowledge be actual or may it be imputed? Certainly if the drawer or maker is a corporation, it cannot be actual, and the intention of the agent who signs the instrument to pick out a fictitious payee is decisive. * * * (2) A second difficulty is, who is the person who makes the instrument payable to a payee—the clerk who after investigating the creditors of a corporation and the amount due then prepares the check, or the treasurer who goes through the mechanical task of signing his name, trusting in the honesty of the clerk for all essential details? The better view would seem to be that the signer does after all create the instrument and should determine who owns it, and that any attempt to decide how far the treasurer uses his mind in examining the payee's name on a check and how far he uses his hand only would lead to endless fine distinctions. * * *"

bank was at fault and cannot in equity and good conscience retain the money.⁶ Appellant's authorities fall in three groups involving three special situations: the chief, involves the exceptional rule of *Price v. Neal* (1762), 3 Burr. 1354, 97 Reprint 871, that a drawer or drawee must at his peril recognize the drawer's signature; the second, the special duties of the relationship of a depositor to his depository; the last, involves the preclusion of a drawer to deny the legal effect of the endorsement of his intended payee. Each group involves special problems of its own inapplicable to the situation of the parties to this appeal, and none, it is submitted, furnishes any general principle applicable to a case involving the rights of a drawee against a presenting bank which has collected under a forged endorsement of the signature of an ascertainable and existing payee.

Appellant's first group of authorities, involving the exceptional rule of *Price v. Neal*, cannot assist it here, since that rule does not rest on any nice principle of comparative negligence or fault nor on the appreciation of the imagined equities of the parties' situations. A mechanical rule to promote negotiability by certainty, it is, as Judge Sibley said in *Insurance Co. v. Fourth National Bank*, *supra* (quoted by this Court, 134 F. (2d) at 62), simply "the ingrafted exception, arising from the nature of the subject matter, that one must recognize his own or his drawer's signature and alterations in his own paper." Cf. Woodward, *Quasi-Contracts* (1913), § 87. It is subject to an equally mechanical limitation: To invoke the protection of the exceptional rule and bar the drawee seeking to recover, the presenting bank must itself be free from negligence.⁷

⁶ Page citations and quotations of the cases in appellant's brief indicate a general intention to attempt to invoke the old saw that as between two equally innocent persons he who has made a loss possible must bear it. Of this Abel, "The Impostor Payee," 1940 Wisc. L. Rev. 362, has well said, "Perhaps as unilluminating a cliché as there is in the whole range of legal rhetoric, the formulation answers one question by raising two, namely, (1) what are equally innocent parties? (2) which of them has made the loss possible?" Certainly it here affords no reason for departing from this Court's decision and relieving appellant of a personal guarantee it voluntarily gave. Cf. *Insurance Co. v. Fourth National Bank*, *supra*, quoted by this Court, 134 F. (2d) at 62.

⁷ See *United States v. Bank of New York* (1914, C. C. A. 2), 219 Fed. 648, 651; *Bank of Williamson v. McDowell County* (1910), 66 W. Va. 545, 66

Appellant's chief reliance in this first group is *United States v. Chase National Bank* (1920), 252 U. S. 485, and somewhat less the cases of *United States v. National Exchange Bank of Baltimore* (1926), 270 U. S. 527, and *Wells Fargo & Co. v. United States* (1891, N. D. Calif.), 45 Fed. 337, 340. All three are applications of the exceptional rule which the Supreme Court in *Cooke v. United States* (1875), 91 U. S. 389, had long before declared binding on the Government. Each of the three did deny the right of the United States to recover from a collecting bank which had accounted to its correspondent prior to the Government's demand for repayment. Moreover, in all three the Government had urged that negligence in cashing the paper barred the presenting banks from invoking the rule of *Price v. Neal*, while the banks had relied on their position as intermediate endorsers as showing absence of personal fault (252 U. S. 487, 489; 270 U. S. 531-532; 45 Fed. 340). The cases, nonetheless, are not, despite appellant's contention, any authority for a general principle that recovery from a collecting bank free from negligence may not be had for breach of its express guarantee or implied warranty of endorsements.

S. E. 761, 762-764; *First National Bank of Quincy v. Ricker* (1874), 71 Ill. 439; *Louisa National Bank v. Kentucky National Bank* (1931), 239 Ky. 302, 39 S. W. (2d) 497; *First National Bank v. United States National Bank* (1921), 100 Oreg. 264, 197 Pac. 547; *Ford & Co. v. People's Bank of Orangeburg* (1906), 74 S. C. 180, 54 S. E. 204, 10 L. R. A. (N. S.) 63; *Canadian Bank of Commerce v. Bingham* (1902), 30 Wash. 484, 71 Pac. 43 (all recognizing, as a qualification to the doctrine, that the holder's fraud or culpable negligence contributing to the deception of drawee sustains the latter's right to recover back the sum paid on account of the spurious instrument). The authorities with regard to the effect of the holder's failure to require identification, on the drawee's right to recover back payments, are collected in Britton, *Cases on Bills and Notes* (2d ed. 1932), 406, n. 35. See also Beutel, *Brannan's Negotiable Instruments Law* (6th ed., 1938), pp. 769-773. The general rule that the presenting bank and its prior endorsers warrant the payee's endorsement and the validity of their title is a similar mechanical rule for promoting negotiability by certainty. As the court said in *Bergman v. Avenue State Bank* (1936), 284 Ill. App. 516, 1 N. E. (2d) 432, 439: "If, in addition to assuming responsibility for verification of signatures of its depositors, banks were called upon to also assume responsibility for the acts of other persons, the safety of deposit banking would be greatly jeopardized, and if each holder could not come back to his predecessor in such case, the unknown risk of prior infirmities would greatly curtail the circulation of commercial paper and make impossible the conduct of deposit banking as it is generally conducted." See also *Gallo v. Brooklyn Savings Bank* (1910), 199 N. Y. 222, 92 N. E. 633, 634.

The cases turned on the application of the general limitation of negligence on the exceptional rule and hold *Price v. Neal* applies to every case involving a forged drawer's signature where the collecting bank is free from fault. The decisions rest entirely on the failure of the drawee to recognize his drawer's signature and changes in his own paper. None of the three was rested on the fact that the defendant was collecting for a correspondent. The *Chase National Bank* case held (252 U. S. at 495) the fact that the payee's endorsement as well as the drawer's signature was forged did not take the case out of the *Price v. Neal* rule.⁸ In the *National Exchange Bank of Baltimore* case it was held (270 U. S. at 534), extending *Bank of the United States v. Bank of Georgia* (1825), 10 Wheat. 333, 343, to checks where the drawer and drawee are agents for the same principal, that the drawee's failure to detect a raised check is within the rule of *Price v. Neal*, especially in view of section 62 of the Negotiable Instruments Law.⁹ The defendant's status

⁸ The cases cited by the Supreme Court (252 U. S. at 496) suggest that, like the court below (250 Fed. 105, 106), it was relying on the effect of the forger's intention under N. I. L., sec. 9 (3), in addition to *Price v. Neal*. The problem is discussed in *Trust Company of America v. Hamilton* (1908), 127 App. Div. 515, 112 N. Y. S. 84. See Beutel, *ibid.*, p. 763. Under the English Bills of Exchange Act, sec. 7 (3), the same result was reached. *Bank of England v. Vagliano Bros.* (1891), A. C. 107. There is a division of state decisions on the point, 12 A. L. R. 1112, 71 A. L. R. 342. We have already seen (*supra*, p. 10) that sec. 9 (3) can have no application to this appeal. The language quoted by appellant (Br. 39) seems to have been borrowed by the Court from Ames, "The Doctrine of *Price v. Neal*" (1891), 4 Harv. L. Rev. 297, 307. Certainly liability to pay a second time is not necessary for recovery. The loss is just as great when the drawee could not validly pay anyone. The consideration for the paper is no concern of the presenting bank. *Insurance Co. v. Fourth National Bank*, *supra*, 12 F. (2d) at 102; *United States v. National Park Bank* (1881, S. D. N. Y.), 3 Fed. 852, 855; *Second National Bank v. Guarantee Trust & Safe Deposit Co.* (1903), 206 Pa. 616, 56 Atl. 72, 73.

⁹ Even on its own facts the *Exchange Bank of Baltimore* case itself appears an extension by a strictly mechanical application of the rule without sufficient consideration of the point at which under the rule of the *Cooke* case the United States became bound by its payment. The decision was on demurrer, however, after a refusal by the Government to plead over. The result is not required by sec. 62, since under sec. 132 as by the law merchant payment is not acceptance. Cf. *First National Bank v. Whitman* (1876), 94 U. S. 343, 347; *South Boston Transit Co. v. Levin* (1924), 249 Mass. 45, 143 N. E. 816. The decision has been criticized as unsound on its special facts in 26 Col. L. Rev. 1030 and 11 Minn. L. Rev. 68, 70.

as a collecting bank was not referred to by the Supreme Court, and the court below had expressly declared that in view of the absence of negligence and the application of *Price v. Neal* any consideration of defendant's status was unnecessary. *United States v. National Exchange Bank of Baltimore* (1924, C. C. A. 4), 1 F. (2d) 888, 889. In the *Wells Fargo* case the principle of *Bank of United States v. Bank of Georgia, supra*, was similarly followed though without citation, and the exceptional rule applied in a situation where, as in the *Exchange Bank of Baltimore* case, the common drawer and drawee made it possible in the court's view of the facts to protect against alteration.

Appellant's second group of authorities, involving the duties of a depositor to his depository bank, are equally unavailing to establish the existence of a general rule either that a presenting bank must be guilty of fault before recovery can be had or that there is a duty owed the presenter by the drawer or drawee to prevent and detect forged endorsements. In this group appellant's main reliance is *Leather Manufacturers Bank v. Morgan* (1886), 117 U. S. 96. The *Morgan* case, on the one hand, follows (117 U. S. at 109) *Bank of the United States v. Bank of Georgia* in holding the rule of *Price v. Neal* applies to a raised check so that the drawer must verify at his peril the original tenor of the instrument or be barred from recovery, and, on the other, follows (117 U. S. at 119) *Dana v. National Bank of the Republic* (1882), 132 Mass. 156, also cited by appellant (Br. 33) in holding that the relationship of a depositor to his depository involves a duty to examine the paid checks and bank statement or passbook and to give prompt notice of the irregularities detectable by the means. The *Morgan* case, however, can give appellant little comfort in connection with this appeal, for it expressly recognizes (117 U. S. at 117) that even between the depositor and his bank the latter is solely chargeable with determining the validity of endorsements and the depositor owes no duty to the bank to investigate beyond the paid checks and bank statement or passbook, which themselves cannot disclose a forged endorsement. Indeed, of the many cases in this second group cited by appellant without comment, two (*National Bank of Commerce v. Tacoma Mill*

Co. (1910, C. C. A. 9), 182 Fed. 1, 12; and *National Surety Co. v. Manhattan Co.* (1929), 252 N. Y. 247, 169 N. E. 372, 374) are express applications of the rule that the bank must investigate endorsements and require guarantees at its peril and the drawer may rely thereon and need make no detailed examination of his other books and records.¹⁰ *England National Bank v. United States* (1922, C. C. A. 8), 282 Fed. 121, appellant's other leading case belongs to the same group as the *Morgan* case, the sole difference being that the alteration not detected by the drawer was in the payee's name instead of the amount.

The last group of appellant's authorities, involving the preclusion of a drawer to deny the legal effect of the endorsement of his intended payee, is without the remotest application to this appeal where the payees named in the checks were actually existing Marine Corps officers who were presumably well known to the disbursing officers making the checks payable. Appellant's special reliance appears to be sections 24 and 61 of the Negotiable Instruments Law (Appt.'s Br. 13, 27-30) but *Darling Stores Inc. v. Fidelity Bankers Trust Co.* (1941), 178 Tenn. 165, 156 S. W. (2d) 419, 423, cited without comment (Appt.'s Br. 34), appears to be an application of appellant's argument. Appellant evidently recognizes that neither the *Darling Stores* case nor section 61 (D. C. Code, 1940, sec. 28-502), providing that the drawer admits the payee's capacity to endorse, are applicable here where the payees named were not fictitious and could have passed valid title by

¹⁰ See *Board of Education v. National Union Bank* (1938), 121 N. J. L. 177, 1 A (2d) 383, cited with approval by this Court (134 F. (2d) at 62), where the New Jersey court declared (p. 386): "The bank * * * was charged with a duty to scrutinize the endorsements by which it obtained title. It cannot be heard to say that because it was derelict in its duty the negligence of an employee of the board in not conducting a thorough audit each time the vouchers were returned can preclude a recovery." See also *Jordan Marsh Co. v. National Shawmut Bank* (1909), 201 Mass. 397, 87 N. E. 740, 744; *Shipman v. Bank of State* (1891), 126 N. Y. 318, 27 N. E. 371, 373. Cf. Brady, *Bank Checks* (2d ed., 1926), § 117: "When the bank returns the check to the depositor, * * * the latter has a right to assume that the bank has ascertained the endorsements thereon to be genuine." The rule applies *a fortiori* between the collecting bank and the drawer or drawee, since there is no privity and no duty of vigilance is owed. *Fallick v. Amalgamated Bank* (1931), 232 App. Div. 127, 249 N. Y. S. 238, 242.

their genuine endorsements¹¹ for it attempts to bolster the argument by invoking section 24 of the Negotiable Instruments Law (D. C. Code, 1940, sec. 28-201) which provides that the existence of consideration is presumed. The bearing of that provision is equally undiscoverable. Recovery from the presenting bank is not sought because the United States did not owe the payees named the amounts of the checks, but solely because appellant had no title to receive the proceeds of the checks since their endorsements were forged.¹²

Of all the cases it has cited appellant's only important aid is the dictum in *American Surety Co. v. Bank of California* (1941, D. C. Ore.), 44 F. Supp. 81, 84, that "there was a duty owed to the public to supervise the employee and there was a further duty to see that checks for amounts which the concern did not owe should not be consistently placed in the hands of the pub-

¹¹ It may be added, however, that, even if the payees had been non-existent, the warranties of sections 61 and 62 would not be relevant here. Drawers and acceptors admit the existence of the payee and his capacity to endorse, not that the payee will endorse, has in fact endorsed, nor that an unauthorized endorsement by an embezzler will be accepted as the payee's. *American Express Co. v. Peoples Savings Bank* (1921), 192 Iowa 366, 181 N. W. 701, 703; *Robertson Banking Co. v. Brasfield* (1918), 202 Ala. 167, 79 So. 651, 652; *Ocean Accident & Guarantee Corp. v. Lincoln National Bank* (1934), 112 N. J. L. 550, 172 Atl. 45, 49; *National Union Fire Insurance Co. v. Mellon Bank* (1923), 276 Pa. 212; 119 Atl. 910, 912. The *Darling Stores* case stand alone on the point and has been strongly condemned. See case notes, 90 U. Pa. L. Rev. 973; 17 Tenn. L. Rev. 397. See esp. 22 Boston U. L. Rev. 336, 340, where it is said: "Due to the uncertainty of life, it would be no longer safe to make checks payable to anyone without first enquiring as to that persons existence. A failure to do so according to the rule of this case, would open up the question of the drawer's due care." Where, however, the intended payee does actually endorse, secs. 61 and 62, of course, protect the holder against denial of existence or capacity. Cf. *Dorsey v. Manhattan Co.* (1941), 33 N. Y. S. (2d) 69, 74, where the court said, sec. 61 "estops plaintiff from denying the existence of the payees but does not estop plaintiff from proving that the signatures of the payees were forged."

¹² Had the endorsements actually been made by the officers named and intended by the disbursing officers signing the checks, there could be no recourse on the presenting bank no matter how fraudulent the claims of the payees (see *Insurance Co. v. Fourth National Bank*, *supra*, 12 F. (2d) at 102; *Second National Bank v. Guarantee Trust & Safe Deposit Co.* (1903), 206 Pa. 616, 56 Atl. 72, 73), and if the presenting bank could have obtained a valid title despite the forgeries, there could be no recovery (*United States v. Guaranty Trust Co.* (1934), 293 U. S. 340, 346).

lic." That language, however, was not essential to the decision nor supported by any reason given by the Oregon District Court. It is plainly contrary to the general principles of the law merchant as applied in the banking business in the United States and purports to be rested on cases which were specifically rejected by this Court in the *Washington Trust Company* case as out of line with the federal rule.¹³

It is accordingly submitted that appellant has shown no reason whatever for departing in this case from the rule established by this Court in the *Washington Trust Company* case and by the Supreme Court in the *National Exchange Bank of Providence* case.

II

Appellant's payment over before notice of the forgeries did not relieve it of liability for breach of its written guarantees nor its implied warranties

It is common ground to appellant and the Government that where payment is made to a bank which presents a check not as owner but merely as agent for collection for another and the fact of such agency is fully disclosed to the drawee, the agent which has not given its personal guarantee cannot be compelled to repay after it has remitted the proceeds to its correspondent without notice of a preceding forged endorsement. In the *Washington Loan & Trust Company* case the defense of payment over before notice was not discussed by this Court in its opinion. It plainly appears, however, that the defendant Columbia National Bank was there held liable on checks which

¹³ See 134 F. (2d) at 63, rejecting *Young v. Gretna Trust & Savings Bank* (1936), 184 La. 872, 168 So. 85, 89; and *Defiance Lumber Co. v. Bank of California* (1935), 180 Wash. 533, 41 P. (2d) 135, 140. See also *American Exchange National Bank v. Yorkville Bank* (1924), 122 Misc. 616, 204 N. Y. S. 621, aff'd by mem. 210 App. Div. 885, 206 N. Y. S. 879, expressly holding the drawer owes no duty to the collecting bank and drawer's negligence can be no defense even to the drawee since the collecting bank is responsible under its implied warranty or express guarantee of endorsements. The liability of presenting bank to drawee and of drawee to drawer often rest on widely differing bases. Compare the English Bills of Exchange Act, sec. 60, relieving the drawee bank from any liability to the drawer for good-faith payments on paper presented for payment under forged endorsements, with the opposite American rule. *Gallo v. Brooklyn Savings Bank* (1910), 199 N. Y. 222, 92 N. E. 633, 634.

it had presented and guaranteed as collecting bank on behalf of the Trust company. Appellant none the less now urges that its payment over to its correspondent, the Anacostia Bank, before notice of the forgeries constitutes an absolute defense despite its express personal guarantees in writing of prior endorsements and the fact that it presented the paper and collected the proceeds without disclosing its agency (Appt.'s Br. 14, 15, 27, 35). The United States submits the defense of payment over is not available in such circumstances, in view of the presenting bank's personal guarantees and in addition because it failed to disclose that it was acting only as agent and presented the paper exactly as if it had full and valid title.

1. *Under customary banking practice appellant's written guarantees of prior endorsements were unconditional personal undertakings unaffected by its relation to its correspondent.*—The Supreme Court in *Clearfield Trust Co. v. United States* (1943), 318 U. S. 363, 368, expressly reserved the question of the effect of the presenting bank's written guarantee of prior endorsements.¹⁴ This Court, however, in *District National Bank v. Washington Loan & Trust Co.* (1933), 62 App. D. C. 198, 65 F. (2d) 831, 833-834, has held that a drawee in receiving and paying a check so guaranteed by the presenting bank is relieved from any necessity of requiring proof of title or of the genuineness of the endorsements but may rely exclusively on the guarantee and look to the presenter for a return of the proceeds should the endorsements prove forged.

Such guarantees as appellant gave in this case are independent personal undertakings entirely collateral to the warranty of title implied from presentation for payment by an owner. The guarantee is given, as this Court indicated in the *District National Bank* case, in consideration of the drawee making immediate payment. In the absence of such guarantee the drawee may first avail itself of its law merchant right to investigate the title of the endorsers (*Citizens National Bank*

¹⁴ In *United States v. Guaranty Trust Co.* (1934), 293 U. S. 340, 349, the Court had declared that the guarantee did not extend to the "authenticity of penmanship of the payee." It observed, however: "The express guarantee of prior endorsements means no more than what is implied by every unrestricted endorsement; namely, that the endorsements were effective to give to the holder a legal title and the right to enforce payment of the check."

v. Reynolds (1920), 72 Ind. App. 611, 126 N. E. 234, 236; *Risley v. Phoenix Bank* (1877), 11 Hun. 484, 486, aff'd 83 N. Y. 318, 111 U. S. 125).¹⁵ It is common knowledge that it is the purpose and origin of the guarantees of prior endorsements to thus obtain the personal undertaking of the presenting bank as guarantor of all the prior endorsements. The general understanding of the modern law merchant on the point is perhaps best summarized by Judge Sibley in *Philadelphia National Bank v. Fulton National Bank* (1928), 25 F. (2d) 995, 997, where he said:

It will be noted in the case last cited [*United States v. National Exchange Bank of Providence*, 214 U. S. 302] at page 309 (29 S. Ct. 666), that the indorsee for collection was itself required expressly to guarantee the indorsements. This it could not have afforded to do without some guaranty to it. I suspect the origin of this express guaranty of prior indorsements in indorsing to a banker for collection took its origin thus, to enable a presenting banker to make such a guaranty to a drawee who did not care to rely upon the liability of a distant forwarding bank.

No foundation exists for appellant's attempt to exclude from the protection of the guarantee cases like the present where the guarantor was only an agent and paid over the funds without notice of the forgeries. Such a limitation would destroy its usefulness for it is the very situation in which the guarantee is especially required. The language of the guarantee itself indicates an absolute undertaking to guarantee endorsements in all events without any regard to the quality in which the presenter holds the paper or whether payment over shall have been made. Even if the language were uncertain the origin and purpose of the guarantee plainly show that it was intended to operate in precisely the situation here involved. In its present form the requirement of a personal

¹⁵ See also *Roberts v. Tucker* (1851), 16 Q. B. 560, 577-578, 112 Eng. Reprint 994, and *Shipman v. Bank* (1891), 126 N. Y. 318, 27 N. E. 371, 373, where the court, with reference to the custom of bankers, said the drawee "has the opportunity by requiring identification when the check is presented, or a responsible guaranty from the party presenting it, of ascertaining whether the endorsement is genuine or not." Compare Kniffin, *The Practical Work of a Bank* (7th ed., 1928), 94-96.

guarantee by the presenting bank stems from the New York Clearing House resolution of June 4, 1896, which was promptly copied by all the other clearinghouses and has now become part of established banking practice. (See *First National Bank of Belmont v. First National Bank of Barnesville* (1898), 58 Ohio 207, 50 N. E. 723, 724). Originally confined to paper bearing the endorsement "for collection" or similar restrictive endorsements, the requirement was extended by a circular of the New York Clearing House, dated February 18, 1904, and soon followed by the other clearinghouses, to paper endorsed "pay to any banker" or otherwise than generally.¹⁸

Since no New York case had held such endorsements restrictive so as to exclude the warranty implied from presentment for payment, the extension occasioned great discussion and serious criticism. The consensus of opinion supported the general extension of the requirement, however, and the understanding of the banking community concerning the purpose of the guarantee on paper restrictively endorsed is typified by an editorial appearing contemporaneously in 21 Banking Law Journal 217, where it was stated (p. 219):

The bank collecting paper under such an indorsement being a mere agent is, as agent, according to the courts, not responsible for genuineness of prior indorsements, and unless it binds itself by guaranty of genuineness, recourse of all the banks which pay such paper, whereon prior indorsements turn out to be forged or unauthorized, must be limited to indorsers prior to the collecting bank. As it is the policy of clearinghouses to provide for immediate recourse by the bank of payment against the bank collecting the paper through the clearinghouse, in such cases, guarantees are necessary where the collecting bank is a mere agent for an owner further back in the chain of transfer.

The United States brings this suit on the guarantees in its capacity as drawee. Its part of the contract was fulfilled when it paid the proceeds on the strength of the guarantee and neither

¹⁸ The text of the circular, including the resolution of June 4, 1896, the opinion of counsel, and the ruling of the managing committee are published in full in 21 Bank. L. J. 99. See for the action in other cities *ibid.* 246.

it nor the Treasurer undertook any duty to the presenting bank. Such a personal written undertaking by the presenter is absolute and makes all other considerations irrelevant. As the Second Circuit said in *McKinnon v. Boardman* (1909, C. C. A. 2), 170 Fed. 920, 922:

In other words, the bank's guaranty procured the money. Those who have relied upon the bank's assurance that those indorsements were authorized and have lost thereby, are entitled to redress.

Cf. *First National Bank of Winnsboro v. First National Bank* (1926, Tex. Com. App.), 299 S. W. 856, 857. Under the modern law merchant it is a guarantee of the title of the whole of the instrument excepting only the drawer's signature.

New York Produce Exchange Bank v. Twelfth Ward National Bank (1909), 135 App. Div. 52, 119 N. Y. S. 988. The fact that the presenting bank has paid over the proceeds (*Hartford-Connecticut Trust Co. v. Riverside Trust Co.* (1938), 123 Conn. 616, 197 Atl. 766, 770) or that the drawee may not be liable to the drawer because the latter is precluded from asserting the forgeries as against the drawee does not relieve the presenting bank of liability on its guarantee. (See *Manufacturers Trust Co. v. Harriman National Bank & Trust Co.* (1932), 146 Misc. 551, 262 N. Y. S. 482, 484, aff'd 238 App. Div. 777, 262 N. Y. S. 486; *Second National Bank v. Guarantee Trust and Safe Deposit Co.* (1903), 206 Pa. 616, 56 Atl. 72, 73.) The damage the United States seeks to recover arises from the breach of the contract which occurred when the money was paid on paper on which the endorsements were forged, the obligation being unconditional, all other considerations are unnecessary.¹⁷

¹⁷ Whether the Government's rights under such a contract are determined by the law merchant or by the larger principles governing its rights on contracts of guaranty and suretyship need not here be decided. Cf. Aigler, *Cases on Negotiable Paper and Banking* (1937), p. 555n: "On such questions [the effect of negligence and change of position] it may be important whether the plaintiff's action is purely quasicontractual or is grounded on a warranty found perhaps in the terms of the defendant's indorsements." Ordinarily the negligence of its officers and servants does not preclude the United States from recovery from sureties and guarantors even when private litigants would be barred. (*United States v. Hartford Accident & Indemnity Co.* (1941, C. C. A. 2), 117 F. (2d) 503, 505; *Hunter v. United States* (1831), 5 Peters 173, 187-188; *Hart v. United States* (1877), 95 U. S. 316, 318).

2. *Under federal law appellant's presentation for payment of the checks under an unrestricted endorsement was a representation and warranty that it had valid title to receive the proceeds in its own right.*—Even aside from its personal guarantee appellant is liable here regardless of payment over. Appellant does not contend that in presenting the checks for payment it disclosed to the Treasurer of the United States that it was acting merely as agent for the Anacostia Bank and had no valid title to receive the proceeds. It relies entirely on the effect of notice from the endorsements of the Anacostia Bank, "Pay to the Order of any Bank, Banker or Trust Co."

The law merchant as manifested in current banking practice, however, recognizes no such defense for a presenting bank in appellant's situation. The rule is summarized by the court in *Hartford-Connecticut Trust Co. v. Riverside Trust Co.* (1938), 123 Conn. 616, 197 Atl. 766, 769, where it said:

when checks are presented to a drawee bank for payment its sole duty is to determine the genuineness of the drawer's signature, and as to all other matters, including the genuineness of indorsements, it may rely on the warranties expressed by, or implied from, the indorsements of the presenting bank. Therefore, a drawee bank which pays a check to the presenting bank on the forged indorsement of the payee's name, in ignorance of the forged indorsement, may recover the amount paid even though the presenting bank has accounted to its principal. * * * By presenting checks for payment a bank asserts its ownership or its right to collect, and the drawee in making payment has the right to rely on such assertion.

For appellant to succeed in its defense that it was known by the Treasurer from the endorsements "Pay to the order of any Bank, Banker, or Trust Co." that it could be only the agent of the Anacostia Bank it is not enough that such endorsements might have constituted appellant either an agent to collect or the owner of the checks. It must appear that the endorsements were plainly incompatible with ownership and incapable of any interpretation except that appellant was a mere agent for collection. The endorsements of the Anacostia Bank, however, compel no such inference. They are confined to the ex-

pression "Pay to the Order of any Bank, Banker, or Trust Co." They contain no restrictive words such as "for collection" or "for account of" which disclose that the subsequent endorsee is a mere agent as did those in the cases of *National Park Bank v. Seaboard Bank* (1889), 114 N. Y. 28, 20 N. E. 632; *United States v. American Exchange Bank* (1895, S. D. N. Y.), 70 Fed. 232; and *Wells Fargo & Co. v. United States* (1891, N. D. Cal.), 45 Fed. 337, on which appellant relies.¹⁸

There is no question that the endorsement "Pay to the Order of any Bank or Banker" is special. But nothing in its terms makes it restrictive so that one holding thereunder cannot be regarded as the title owner of the paper and one receiving it must recognize him as merely an agent. On the contrary, such endorsements have been all but universally held to be unrestricted in view of the terms of section 36 of the Negotiable Instruments Law (D. C. Code, 1940, sec. 28-307).¹⁹ Thus the

¹⁸ The distinction is well illustrated by the decision in *National Park Bank v. Eldred Bank* (1895), 90 Hun. 285, 35 N. Y. S. 752, 754, aff'd in mem. 154 N. Y. 769, 49 N. E. 1101, where the Park Bank, after failing to recover from the Seaboard Bank, sued and recovered from the intermediate endorser which, like appellant in this case had not disclosed its agency relationship. See also *National City Bank v. Westcott* (1890), 118 N. Y. 468, 23 N. E. 900, 901. The other cases cited by appellant are equally distinguishable. In *Carson v. Federal Reserve Bank* (1930), 254 N. Y. 218, 172 N. E. 475, a collection notice accompanied the check. *Hibbs v. First National Bank* (1928), 133 Va. 94, 112 S. E. 673, did not involve a check but payment by mistake to a broker acting for another. The endorsement in *United States v. National Exchange Bank of Baltimore* (1924, C. C. A. 4), 1 F. (2d) 888, was similar to that in the present case but the court held it unnecessary to decide the point.

¹⁹ "Sec. 36. When Indorsement Restrictive.—An indorsement is restrictive, which either: (1) Prohibits the further negotiation of the instrument; or (2) Constitutes the indorsee the agent of the indorser; or (3) Vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive." See *Philadelphia National Bank v. Fulton National Bank* (1928, N. D. Ga.), 25 F. (2d) 995, 996; *National Bank of Commerce v. Bossemeyer* (1917), 101 Neb. 96, 162 N. W. 503, 505; *Interstate Trust Co. v. United States National Bank* (1919), 67 Colo. 6, 185 Pac. 260, 261; *Sands v. Parker* (1926), 153 Tenn. 664, 284 S. W. 902, 903; *First National Bank v. Cross and Napper* (1934, La. App.), 157 So. 636, 637-638; *Hawaiian First National Bank v. Waiakea Mill Co.* (1924), 28 Hawaii 35, 39. Only Missouri is contra. *Mississippi Cottonseed Products Co. v. First National Bank* (1940, Mo. App.), 142 S. W. (2d) 1106, 1110, and *Citizens Trust Co. v. Ward* (1917), 195 Mo. App. 223, 190 S. W. 364, citing the earlier Missouri cases but not considering the effect of sec. 36.

court said in *Interstate Trust Co. v. United States National Bank* (1919), 67 Colo. 6, 185 Pac. 260, 261:

It is urged by plaintiffs in error that the endorsements, "Pay to the order of any bank or banker—previous endorsements guaranteed," made by The Interstate Trust Company, and "Received payment through the Denver Clearing House," by The First National Bank, were collection, or restrictive endorsements, and that the endorsers guaranteed nothing as to the genuineness or worth of the paper. A restrictive endorsement is such only when it prohibits further negotiation of the paper, constitutes the endorser merely the agent of the owner, or vests the title in the endorsee in trust for, or to the use of, some other person. Section 4499, R. S. 1908. The authorities are practically unanimous that endorsements such as the ones under consideration can have no such limited or restricted effect (*Crawford on Negotiable Instruments* (1916 Ed.), 78, 79, 130, 132; *Nat. Bank of Commerce v. Bossermeyer*, 101 Neb. 96, 162 N. W. 503, L. R. A. 1917E, 374; *First Nat. Bank of Belmont v. First Nat. Bank of Barnesville*, 58 Ohio St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748; *First Nat. Bank of Crawfordsville v. Indiana Nat. Bank*, 4 Ind. App. 355, 30 N. E. 808, 51 Am. St. Rep. 221; *Woods v. Colony Bank*, 114 Ga. 683, 40 S. E. 720, 56 L. R. A. 929; *New York Produce Exchange Bank v. Twelfth Ward Bank*, 135 App. Div. 52, 119 N. Y. Supp. 988. * * *).

It is also urged by plaintiffs in error that by reason of certain rules and regulations of the Denver Clearing House, with which all banks are familiar, the endorsements in question are taken to be collection endorsements only, and therefore regardless of what the law may be, defendants in error are in effect estopped to deny that the endorsements are collection endorsements only. It is well settled, however, that unrestricted endorsements cannot be varied either by parol evidence, or evidence of custom in business, for the reason that the

statute definitely defines their meaning and controls their effect (*Martin v. Cole*, 3 Colo. 113; *Dunn v. Ghost*, 5 Colo. 134; *Torbert v. Montague*, 38 Colo. 327, 87 Pac. 1145; *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74, 43 Am. Rep. 655; *Moody v. First National Bank*, 19 Tex. Civ. App. 278, 46 S. W. 660; *State Bank v. Cumberland Savings & Trust Co.*, 168 N. C. 605, 85 S. E. 5, L. R. A. 1915D, 1138; *Nat. Bank v. Bossermeyer*, *supra*; *N. Y. Products Exchange Bank v. Twelfth Ward Bank*, *supra*).

Admittedly the customary form of endorsements on paper forwarded for collection is that here used by the Anacostia Bank, but the form contains words of order which are the badge of negotiability, and common experience shows it is equally found on paper purchased or rediscounted by banks and is entirely compatible with ownership (*Sands v. Parker* (1926), 153 Tenn. 664, 284 S. W. 902, 903; *Philadelphia National Bank v. Fulton National Bank* (1928, N. D. Ga.), 25 F. (2d) 995, 996). The court well said of such endorsements in *National Bank of Commerce v. Bossemeyer* (1917), 101 Neb. 96, 162 N. W. 503, 505:

There is nothing on the face of this indorsement which prohibits the further negotiation of the instrument or constitutes the indorsee the agent of the indorser, or vests title in the indorsee in trust for the use of some other person, and hence, by the most elementary principles of statutory construction, the plain meaning of the language must be observed, and it must be held that the indorsement was not restrictive.

* * * Furthermore, any bank receiving a draft with such an indorsement has the right to again indorse it in blank or payable to any particular bank or person. This, of course, it would have no power to do if the indorsement was restrictive. If, however, the words "for credit," "for account," "for collection and return" had been added, the character of the indorsement would have been changed entirely, and it would have been restric-

tive, showing upon its face that the indorsee bank took it only as a collecting agent and not as a holder for value.

It is well settled under federal law that the previous endorsements of the Anacostia Bank being unrestricted appellant's presentation of the checks for payment by the Treasurer without disclosing that it was a mere agent constituted a representation and warranty that it had valid title to receive the proceeds as owner. The cases of *Leather Manufacturers Bank v. Merchants Bank* (1888), 128 U. S. 26, 34-35; *United States v. National Bank of Providence* (1909), 214 U. S. 302, 320; and *Clearfield Trust Co. v. United States* (1943), 318 U. S. 363, 368, firmly establish that one who presents a check for payment impliedly warrants that the endorsements are genuine and confer valid title to receive the proceeds and give the drawee a valid acquittance and that for breach of this implied representation and warranty recovery of the money paid in mistaken reliance thereon may be had. There is no relevancy to appellant's objection (Br. 14, 15) that there can be no implied warranty since presentation for payment and endorsement for receipt do not make the drawee a holder or other indorsee entitled to the warranties of sections 65 and 66 of the N. I. L. (D. C. Code, 1940, secs. 28-506 and 507).²⁰ The warranties provided by those sections do not operate to destroy other warranties of the law merchant nor is the omission from the District of Columbia Code, section 196 of the N. I. L., providing

²⁰ It is elementary that the endorsement for payment is not an endorsement for negotiation but a mere receipt. See *Osborn v. Gheen* (1886), 5 Mackey 189, 194, aff'd 136 U. S. 646; *Hubert v. Bössart* (1886), 70 Iowa 718, 29 N. W. 608, 610; *Pickle v. Muse* (1890), 88 Tenn. 380, 12 S. W. 919; *Keene v. Beard* (1860), 8 C. B. (ns) 372, 382; cf. *Rowley v. National Bank of Deposit* (1892), 63 Hun. 550, 18 N. Y. S. 545; *Eichner v. Bowery Saving Bank* (1897), 24 App. Div. 63, 48 N. Y. S. 978, 980; see also 17 Harv. L. Rev. 581. It, therefore, does not involve any warranty of title although a few courts by looseness of language and a natural confusion with the warranty implied from presentment for payment have so stated. See *First National Bank v. Federal Reserve Bank* (1931), 88 Mont. 589, 294 Pac. 1105, 1106; *Moler v. State Bank* (1929), 176 Minn. 449, 223 N. W. 780, 783; *First National Bank v. Farmers & Merchants Bank* (1898), 56 Neb. 149, 76 S. W. 430, 432. The real nature of the implied warranty in such cases appears to be as indicated in *Boston & Albany R. R. v. Richardson* (1883), 135 Mass. 473, 475.

that in the silence of the Act the rules of the law merchant shall govern, an implied repeal of the law merchant rules.²¹

It is accordingly submitted that regardless of its payment over before notice of the forgeries appellant remains liable to the United States for breach of both its written guarantees and its implied warranties of title.

CONCLUSION

For the reasons stated it is respectfully submitted that the decision of the court below is correct and should be affirmed.

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DECEMBER 1943.

²¹ At all events appellant's theoretical objections to the rule come too late. It is too long settled in the federal courts and other leading commercial jurisdictions. See esp. *White v. Continental National Bank* (1876), 64 N. Y. 316, 318, 21 Am. Rep. 612; *First National Bank v. Northwestern National Bank* (1894), 152 Ill. 296, 38 N. E. 739, 743; *Interstate Trust Co. v. United States National Bank*, *supra*; see also *Bank of Williamson v. McDowell County Bank* (1910), 66 W. Va. 545, 66 S. E. 761, 764, and *American Exchange National Bank v. Yorkville Bank* (1924), 122 Misc. 616, 204 N. Y. S. 621, *aff'd* 210 App. Div. 885, 206 N. Y. S. 879. In Massachusetts it has been thought unnecessary to determine the exact basis of liability since recovery for payment under mistake is ordinarily available. See *First National Bank v. City National Bank* (1902), 182 Mass. 130, 134, 65 N. E. 24, citing for comparison, however, *Railroad Co. v. Richardson* (1883), 135 Mass. 473, 475, which held a representation of warranty of title is implied by the presentation for transfer of a stock certificate. The nature of the obligation, however, may make a decisive difference where the statute of limitations might apply. Cf. *Home Insurance Co. v. Merchantile Trust Co.* (1928), 219 Mo. App. 645, 284 S. W. 834, 836; *Merchants National Bank v. Continental National Bank* (1929), 98 Cal. App. 523, 277 Pac. 354, 357.

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

In the United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8562

NATIONAL METROPOLITAN BANK, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF COLUMBIA**

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ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT OF THE
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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

Appellant's reply brief presents certain contentions not advanced before and cites additional authorities for its contention that this Court should depart from its decision in the *Washington Loan & Trust Company* case and hold negligence in the issuance of the checks precludes recovery. Appellant's new contentions are that recovery is barred (1) because the United States by delaying unreasonably in instituting the present suit has caused appellant to lose its right of recovery over, (2) because the United States also has a remedy against the disbursing officer who in good faith signed the checks, and (3) because the checks were altered on their face.

The Government submits that these circumstances now urged by appellant in no way bar recovery and that appellant's authorities are either plainly distinguishable from the instant case on their facts or represent departures from the equitably

sound and generally established rule which was adopted by this Court in the *Washington Loan & Trust Company* case.

I

Delay in instituting suit is no defense to appellant

Appellant urges it has been prejudiced by the delay of the United States in instituting this action in that its right of action over against the Anacostia Bank is lost. It refers to the recent case of *United States v. First National Bank of Chicago*, (1943, C. C. A. 7) 138 F. (2d) 681, holding that delay in detecting and notifying the defendant of the forgeries having prejudiced the bank recovery was barred. But in the case now at bar any delay in instituting suit caused appellant no prejudice. It had notice of the forgeries at the approximate time of their discovery on March 21, 1938 and formal demand for repayment was made on appellant on December 8, 1938. Appellant, therefore, knew the Government intended to hold it liable and had ample opportunity to proceed against its remitter and guarantor, the Anacostia Bank, before the statute of limitations could bar its claim on any theory. If it has suffered damage, it is not because of delay on the part of the United States but because of its own failure to act. Cf. *United States v. National Bank of Commerce* (1913, C. C. A. 9), 205 Fed. 433, 437. It was not obliged to await judgment against it before asserting its rights over against its remitter. *Oriental Bank v. Gallo*, (1906) 112 App. Div. 360, 98 N. Y. S. 561, 563, aff'd 118 N. Y. 610, 81 N. E. 1170.

Moreover, as stated in its answer, appellant was the agent for collection of the Anacostia Bank of Anacostia, D. C. As agent, upon payment of the present judgment in favor of the United States, it may yet recover from its remitter for breach of the implied agreement to indemnify or reimburse it for loss sustained in executing its principal's directions. *Federal Re-*

serve Bank v. Atlanta Trust Co., (1937, C. C. A. 5) 91 F. (2d) 283, cert. den. 302 U. S. 738; see also *Guarantee Title & Trust Co. v. Viola State Bank*, (1928) 124 Kans. 776, 262 Pac. 1037. *Hidalgo Steel Co. v. Moore & McCormack Co.*, (1923, S. D. N. Y.) 298 Fed. 331, 334.

It is equally plain appellant was not obliged to wait for judgment but might have impleaded its indemnitor, the Anacostia Bank, in this present action under Rule 14 of the Rules of Civil Procedure. See 1 Moore, *Federal Practice*, § 14.02, p. 744 and cases cited in 1942 supplement note 16c. Cf. *United States v. Canal Bank & Trust Co.*, (1939, E. D. La.) 29 F. Supp. 605, 607. Indeed, it would seem probable the case is one where at common law it might "vouch in" its indemnitor. See annotation, 78 A. L. R. 327.

II

Suit against the disbursing officer is no defense to appellant

But appellant contends that recovery in this action is further barred because the Government has filed suit against the disbursing officers who signed the checks.¹ This contention is equally without merit. If the question be one of election, instituting the present action constituted the Government's election to proceed against the bank. Election might afford a defense to the disbursing officers but it can have no effect here. In fact, however, no election is required. See *Furlong v. Manufacturers National Bank*, (1938) 285 Mich. 517, 281 N. W. 309, 310; *Grubnau v. Centennial National Bank*, (1924) 279 Pa. 501, 124 Atl. 142, 144. Appellant's liability for breach of its personal guaranty of prior endorsements is independent of the Government's right against the disbursing officers. The

¹ Institution of suit is advisable because recovery from the officers' sureties will be barred by limitations five years after the statement of their accounts. Act of August 8, 1888, c. 787, 25 Stat. 387, as amended, 6 U. S. C. 5.

latter arises solely from the officers' duty to account for moneys entrusted to them even when they are free of fault. It may well be that if the officers and their sureties should pay, they would be subrogated to the Government's rights against appellant.

III

Alteration of the purpose notations of the checks is no defense

Appellant also contends recovery is precluded because Foley altered the purpose memorandum on some of the checks before passing them. To support this obviously untenable position appellant attempts to invoke the rule of *Bank of the United States v. Bank of Georgia*, (1825) 10 Wheat. 333, 343, and *United States v. National Exchange Bank of Baltimore*, (1926) 270 U. S. 527, holding the drawer-drawee must recognize alterations in his paper. But that rule, as appellant's cases show, refers only to raised amounts and other alterations in the legal tenor of the paper and not to immaterial changes. If changes were in fact made, they did not alter the terms and effect of the checks so far as concerns appellant or any holder and are therefore not material. Only a material alteration changing its legal effect will avoid an instrument (Negotiable Instruments Law, section 124 (D. C. Code, 1940, sec. 28-806)) and material alterations are narrowly defined by the Act. Cf. Negotiable Instruments Law, section 125 (D. C. Code, 1940, sec. 28-807). Plainly the notations of purpose were not material parts of the checks. Indeed Negotiable Instruments Law, section 3 (2) (D. C. Code, 1940, sec. 28-104), expressly declares that a statement of the transaction which gives rise to an instrument does not render the promise or order to pay conditional or otherwise effect its negotiability. Their alteration cannot, therefore, constitute a defense to appellant.

IV

The Washington Loan and Trust Company case is the only equitably and economically sound rule

Appellant particularly urges upon this Court the case of *United States v. First National Bank of Chicago* (1943, C. C. A. 7) 138 F. (2d) 681. But so far as concerns the three checks on which the First National Bank retained its right of recovery over that decision squarely conflicts with this Court's decision in the *Washington Loan & Trust Company* case that negligence is no defense.² The Seventh Circuit gave no consideration to this Court's decision and the weight of authority cited therein but simply stated the United States was culpably negligent and declared, "Having set in motion the machinery which resulted in the loss, it may not now recover from the defendant thereon." (138 F. (2d) at 686.)

Such a statement is not only contrary to the established rule but is contrary to elementary legal principles of causality. Negligence in issuing the checks is not the proximate cause of the loss since the larceny of the signed checks by Foley, his forgery of the endorsements, and the cashing bank's negligence in failing to verify the payee's identity and signature have intervened. Cf. *Exchange National Bank v. Bank of Little Rock*, (1893, C. C. A. 8) 58 Fed. 140; *National Bank v. Oklahoma City*, (1912) 32 Okla. 432, 122 Pac. 644, 647; *Jordan Marsh v. National Shawmut Bank*, (1909) 201 Mass. 397, 87 N. E. 740, 742-743. The proximate cause of loss was the failure of the Anacostia Bank to exercise its last clear chance to prevent payment pursuant to the forged endorsements by requiring the genuineness of the payees' endorsements to be proven or guaranteed. There is no showing whatever that the conduct

² In this aspect the *First National Bank* case is also in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Onondaga County Savings Bank v. United States*, (1894, C. C. A. 2) 64 Fed. 703.

of the Anacostia Bank or of appellant with respect to the identity of the payees was directly and proximately affected by any carelessness of the United States in the issuance of the checks.

1. This Court's decision accords with equitable principles and the overwhelming weight of authority that the carelessness of the drawer is no defense unless it affirmatively affects the conduct of the cashing or presenting bank, and that the drawer of a check owes no duty to one who voluntarily cashes a check to protect him against the forgery of the payee's signature. Were the rule adopted by the Seventh Circuit to obtain, on the other hand, facts unknown to the cashing bank and upon which it did not rely would relieve it of liability to which its own negligence exposed it. Such a rule is obviously inequitable, yet appellant here attempts to urge that it is the result required by equitable principles and that the loss should fall upon the drawer as the one whose negligence made possible the loss rather than on the holder of the instrument whom it seeks to characterize as "innocent." Appellant's argument ignores the facts that the drawer is not negligent because he owes no general duty to one voluntarily taking the instrument to protect him against the forgery of the payee's signature and that a bank which has expressly guaranteed the genuineness of the payee's endorsement to the drawee is certainly not an "innocent" party if there is forgery.

When a check is made payable to the order of a definite payee, the obligation of the first person accepting his endorsement and cashing the check is to ascertain that the endorsement is that of the payee named in the instrument. This duty is absolute; it is not to be measured in terms of reasonable care. No one is compelled to cash the check nor to accept the endorsement, and unless the cashier knows the payee and is satisfied of the genuineness of the endorsement, he should refuse to accept the

endorsement or take the check. He may not take the paper, give it currency by his own endorsement and guarantee, and later seek to escape liability on the ground he was "innocent" but misled. If the endorsement is forged and loss occurs, the loss is not caused by the fact that the payee is fictitious or non-existing or not intended to have an interest in it. It is caused solely because the person cashing the check has accepted a purported endorsement by someone not authorized to endorse it by the drawer or by the terms of the instrument itself and has wrongfully failed to discover that fact but instead accepted the word of a thief and forger and paid him the money.

Where, as in the instant case, the presenting bank, after receiving the check from a correspondent, personally guarantees in writing the genuineness of prior endorsements, it is likewise not an "innocent" party. It represents to the drawee that the duty of identifying the payee has been fully performed, that the drawee may safely pay the check without investigation and that if the drawee suffers loss by reason of an endorsement being forged it will be indemnified by the guarantor. It is solely in reliance upon this representation and guarantee of indemnity that the drawee pays. In turn, the presenting bank in guaranteeing prior endorsements is not caused to act by any carelessness of the drawer in issuing the check for it has no knowledge of any of the circumstances surrounding the issuance of the check or of the means by which the payee was identified by the cashing bank. It also acts upon the responsibility of its own prior endorser, ordinarily its customer or its forwarding correspondent bank, which in turn has guaranteed the prior endorsement to it. See *Philadelphia National Bank v. Fulton National Bank*, (1928, N. D. Ga.) 25 F. (2d) 995, 996. It is upon this basis that the banking business is conducted. *City of New York v. Bronx County Trust Co.*, (1933) 261 N. Y. 64, 184 N. E. 495, 497; *McKinnon v. Board-*

man, (1909, C. C. A. 2) 170 Fed. 920, 922; *National Bank of Commerce v. Fish*, (1916) 67 Okla. 102, 169 Pac. 1105, 1106. Where the endorsement of the payee is subsequently discovered to be forged, the presenting bank merely charges the account of the prior endorser. They suffer no loss unless, as in the *First National Bank of Chicago* case, the prior endorser is insolvent and even then it is the financial irresponsibility of the prior endorser who negligently cashed the check without verifying the payee which has caused the loss and not the fact that the drawer's dishonest clerk supplied the name of the payee.

2. Finally, it is common knowledge that almost all banks carry forgery insurance so that under the prevailing rule the economic cost of an occasional loss is spread over the entire field of the banking business. The Government and large business concerns can, of course, equally protect themselves by requiring bonds of vouchering clerks or by insurance, but the impact of the rule adopted by the Seventh Circuit and urged by appellant would be most serious on the small businessman whose modest undertaking will not support either of these measures for distributing loss. In the last analysis, that decision is a step toward the rejection of the settled American rule and the adoption of the German continental system where any endorsee acquires good title to a negotiable instrument if he purchased it for value and in good faith. See *United States v. Guaranty Trust Co.*, (1934) 293 U. S. 340, 343. Under the German system, the use of checks for the ordinary payment of obligations or exchange of money is uncommon. The German system promotes negotiability but at the expense of general use. See Kessler, "Forged Indorsements," (1938) 47 Yale L. J. 863. The issuance of paper and the use thereof for payment instead of cash seem at least as desirable economically as untrammelled negotiability. Indeed it must not be forgotten that while the bill of exchange is an instrument of

credit and easy negotiability is of its essence, the check is an instrument of payment and certainty must not be sacrificed to attain easy collectibility.

The general situation was excellently summed up by the Court of Appeals of New York in *Gallo v. Brooklyn Savings Bank*, (1910) 199 N. Y. 222, 92 N. E. 633, 634, where the court said:

"Corporations, some of them numbering their stockholders, by thousands, and usually ignorant of their identity and signatures, pay their dividends by checks to the orders of the various stockholders, transmitted by mail, relying on their right to reclamation from the banks in case the checks have been indorsed or collected by persons not entitled thereto. So, also, a person will send by post to the most distant part of the country his check to the order of another person to whom he wishes to pay or transfer money, confident in the knowledge that the abstraction of the check can entail no loss on him. On the continent of Europe a different rule prevails, and payment by the drawee to a party presenting the same, of a bill drawn to order, is valid, even though the indorsement is forged, provided the drawee acts in good faith and without negligence. In England the common-law rule prevailed as to bills (but not as to checks) until the bills of exchange act of 1882, which adopted the continental rule as to sight bills, but not as to time bills, though a limited protection against forgery of the name of the payee may be had by "crossing."³ Such a rule would render the present business methods of this country impossible. Although at times banks

³ It is the undoubted law of England, however, that in a situation like this or the *Washington Loan & Trust Company* case the presenter of the check is liable to the drawer although the latter's vouchering clerk fraudulently supplied the name of a payee intended to have no interest in the check. Compare *Olutton v. Attenborough & Sons*, (1897) A. C. 90 and *Vinden v. Hughes* (1905) 1 K. B. 795 with *Bank of England v. Vagliano Bros.*, (1891) A. C. 107. See also *North & South Wales Bank v. Macbeth*, (1908) 1 K. B. 13, 17, *aff'd* (1908) A. C. 137.

have complained of the harshness of our rule, and in some instances while acting in good faith have been subjected to severe loss *Shipman v. Bank of the State of N. Y.*, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821), as a result of this rule banks are used by all classes of our people for the deposit of funds and payment made by check to an extent unknown elsewhere. Of course, a party entitled to the receipt of money may insist upon its payment in cash and not by check."

CONCLUSION

It is therefore respectfully submitted that the decision of the court below is correct and should be affirmed.

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MARCH 1944.

United States Court of Appeals

DISTRICT OF COLUMBIA

April Term, 1943.

No. 8562.

NATIONAL METROPOLITAN BANK, a corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

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United States Court of Appeals

DISTRICT OF COLUMBIA

April Term, 1943.

No. 8562.

NATIONAL METROPOLITAN BANK, a corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

THIS ACTION IS GOVERNED BY EQUITABLE PRINCIPLES.

In the complaint the United States predicates a right to recover on two grounds. In the first count it alleges that it paid under a mistake of fact the amount of checks bearing "false, forged and counterfeit endorsements." This count is what was known in common law pleading as an action in assumpsit for money had and received. Although an action at law, it is governed by equitable principles. "The claimant, to prevail, must show the money was recived in such cir-

cumstances that the possessor will give offense to equity and good conscience if permitted to retain it." *Atlantic Coast Line RR. Co. v. Florida*, 295 U. S. 301, 309.

In the second count it alleges that appellant presented to it for payment checks bearing forged endorsements which appellant guaranteed to be genuine. This is no more than an allegation that appellant presented for payment checks to which it claimed title. "The express guarantee of prior endorsements means no more than what is implied by every unrestricted endorsement, namely, that the endorsements were effective to give to the holder a legal title and the right to enforce payment of the check." *United States v. Guaranty Trust Co.*, 293 U. S. 340, 349. But in order that an endorsement be "effective to give to the holder a legal title and the right to enforce payment" it is not always necessary that it be genuine, for the Negotiable Instruments Law, 28 D. C. Code (1940) s. 24, provides that a forged signature is operative against a party who "is precluded from asserting the forgery." *United States v. Guaranty Trust Co.*, *supra*; *Central National Bank v. National Metropolitan Bank*, 31 App. D. C. 391; *United States v. First National Bank of Chicago*, 138 F. (2d) 681; *Public Bank of New York v. Burchard*, 135 Minn. 171, 160 N. W. 667.

This section incorporates into the Negotiable Instruments Law the doctrine of *Price v. Neal*, 3 Burr. 1354, 1357. In that case Lord Mansfield held that a drawee could not recover from an innocent holder money which the latter had collected on a forged bill of exchange, saying: "The plaintiff cannot recover the money unless it be against conscience in the defendant to retain it. But it can never be thought unconscientious in the defendant to retain the money when he has once received it upon a bill of exchange endorsed to him for a fair and valuable consideration which he had bona fide paid without the least privity or suspicion of any forgery." This principle has been adopted by the Supreme Court of the United States. *United States v. Chase National*

Bank, 252 U. S. 485, and cases cited therein. As a consequence of all of this, the same equitable considerations that are applicable to the first count, for money had and received, are equally applicable to the second count, for breach of the warranty of title. Compare *Crocker-Woolworth Bank v. Nevada Bank*, 139 Cal. 564, 73 P. 456. And the rights and obligations of the United States are not different from those of a private person in like circumstances. *Washington Loan & Trust Co. v. United States*, 77 U. S. App. D. C. 284, 134 F. (2d) 59.

**THE UNITED STATES IS BARRED FROM RECOVERY
BECAUSE THE CHECKS WERE ALTERED ON
THEIR FACE.**

The first equitable consideration that precludes the United States from recovery here and completely distinguishes this case from *Washington Loan & Trust Co. v. United States*, ante, is that most of the checks in question were altered on their face by the forger after they had been drawn by the disbursing officers of the Government.

On all of the checks there was noted on their face, as required, the purpose for which they were drawn. But the evidence elicited at the hearing before the Naval Board of Inquiry convened to investigate the fraud was to the effect that the notation of purpose on most of the checks when drawn was different than the notation of purpose on them when paid. It necessarily follows that the checks were altered on their face by the forger after they were drawn and before he cashed them. This alteration of the checks the United States was bound to recognize.

Whatever the obligation of a drawer to know the signatures of his payees, discussed infra, it is settled beyond doubt that under the doctrine of *Price v. Neal* he must recognize his own signature "and alterations in his own paper." *Insurance Co. v. Fourth National Bank*, 12 F. (2d) 100, 102. Failing to detect an alteration, he is bound by his

payment. This rule is applicable to the United States. *Clearfield Trust Co. v. United States*, 318 U. S. 363; *United States v. National Exchange Bank of Baltimore*, 270 U. S. 527; *United States v. Chase National Bank*, 252 U. S. 485; *United States v. Bank of Georgia*, 10 Wheat. 333; *England National Bank v. United States*, 282 Fed. 121; *Wells Fargo v. United States*, 45 Fed. 337.

And the Supreme Court of the United States has held that this rule is applicable notwithstanding that the checks also bear forged endorsements and that the complaint "placed the demand for recovery solely upon" them. "The forged endorsement puts him in no worse position than he would occupy if that were genuine." *United States v. Chase National Bank*, 252 U. S. at 493, 495.

THE UNITED STATES IS PRECLUDED FROM SETTING UP THE FORGERIES BECAUSE IT NEGLIGENTLY AND UNLAWFULLY ISSUED THE CHECKS.

The United States is precluded from recovery here, second, because of its negligence in permitting these checks to be issued and in failing to discover the defalcations of its agent over a period of more than two years. This negligence made the forgeries and the resulting loss possible. *United States v. First National Bank of Chicago*, 138 F. (2d) at p. 686. In this recent case, decided November 18, 1943, the United States was denied recovery against a collecting bank which had received payment on checks bearing forged endorsements which it had guaranteed. The checks were not payable to bearer. The Court said:

"Having set in motion the machinery which resulted in the loss, it (plaintiff) may not now recover from the defendant thereon."

The principle is well stated in *Walker v. United States*, 139 F. 409, 413, where the Court said:

“The underlying principal of all the decisions is that, when the sovereign comes into court to assert a pecuniary demand against a citizen, the court has authority, and it is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject * * * in like subject matter between man and man. The acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of that authority, may in a proper case work an estoppel against the government. The principle that the sovereign is bound by his own acts, and those of his lawfully authorized agents within the purview of that authority, is a wholesome one, and requires the courts to visit an estoppel upon the sovereign in a proper case where it invokes judicial action.”

That the United States was grossly negligent throughout is not open to doubt. Foley, the forger, whose duties in the Marine Corps, under the Classification Act of 1923, 5 U. S. C. A., s. 673, were to be performed under “immediate or general supervision,” was permitted free access to blank Government checks and permitted to compute amounts due and fill out checks without any supervision or examination of his work. And all of this was in violation of an Act of Congress, 31 U. S. C. A., s. 82, which provides that “all vouchers and payrolls shall be prepared and examined by and through the administrative heads of divisions and bureaus * * * and the disbursing officers shall make only such examinations of vouchers as may be necessary to ascertain whether they represent legal claims against the United States.” The Comptroller of the Treasury ruled that under this statute disbursing officers were to determine whether vouchers “were in all respects properly certified and supported,” while the administrative office was to determine the correctness of the voucher. 20 Dec. of Comp. of Treas. 859. That this negligence was apparent to the Secretary of the Navy, is evidenced by his convening of a Board of

Inquiry after it had been called to his attention in a letter from the Acting Comptroller of the United States, and by the fact that the findings of the Board have not been made public.

The cases are virtually uniform in holding, as was stated by the Court of Appeals of New York in *Gutfreund v. East River National Bank*, 251 N. Y. 58, 167 N. E. 171, 173, a case involving forged endorsements, that:

“ * * * if the negligence of the depositor is the cause of the payment by the bank of a forged check he may not set up the invalidity of the paper which he has induced the bank to act on as genuine. This principle rests primarily on the doctrine of estoppel.”

Cooke & Co. v. United States, 91 U. S. 389; *Leather Mfgs. Bank v. Morgan*, 117 U. S. 96; *United States v. First National Bank of Chicago*, ante; *Phillips v. Joy*, 114 Me. 403, 96 A. 727; *Detroit Piston Ring Co. v. Wayne County Bank*, 252 Mich. 163, 233 N. W. 185; *Scott v. First National Bank*, 343 Mo. 77, 119 S. W. (2d) 929.

The Appellate Division of the Supreme Court of New York recently had occasion to apply this principle in *County of Oneida v. First Citizens Bank*, 264 App. Div 212, 35 N. Y. S. (2d) 782, 784, 785. There a clerk in the employ of the county prepared fraudulent claims in the names of fictitious payees. County warrants were drawn and delivered to the clerk who forged the names of the payees and cashed the warrants, which were ultimately paid by the county. The answer to a complaint by the county for money had and received charged negligence and invoked estoppel. The Court held that the case was ruled by “considerations of equity” and that the bank “may defend by everything which shows that the plaintiff ex aequo et bono is not entitled to the whole of the demand or any part of it.” The pleadings raised “triable issues,” the decision of which should not have been “flung off on a motion for summary judgment.”

Reference may be made at this point to another case from New York. In *City of New York v. Bronx County Tr. Co.*, 261 N. Y. 64, 184 N. E. 495, the City sued depository banks which had paid payroll checks bearing forged endorsements. One defense was that the City had been negligent in issuing the checks. After considering this issue the Court held that there was no negligence since there was no fault to be found in the adoption or use of the City's system of payment, and no way in which the City could have determined that the endorsements on its returned checks were forgeries. In contrast, in the case here, there was clearly fault to be found with the use of the Government's system of payment, and, as will be shown, there was a way in which to determine that the endorsements on the returned checks were forgeries.

THE UNITED STATES IS PRECLUDED FROM SETTING UP THE FORGERIES BECAUSE IT NEGLIGENTLY FAILED TO DISCOVER THE FRAUD.

In *National Surety Co. v. Pres. & Dir. of Manhattan Co.*, 252 N. Y. 247, 169 N. E. 372, 377, it was said that:

“When a depositor fails to warn his bank of forgeries committed after discovery thereof should have been made by him, his neglect is a primary cause contributing to the loss incurred by the bank * * * .”

This principle is applicable here, for the United States does not dispute the fact that during the entire period of the forgeries—2½ years—it failed to utilize the machinery which had been set up in compliance with statute for the audit, examination, and preparation of vouchers, payrolls, and checks. Compare *Erickson v. Iowa National Bank*, 211 Iowa 495, 230 N. W. 342. Any routine examination at any time would have disclosed the defalcations of the forger. In fact, when suspicion was finally aroused, the entire fraud was laid bare in a few days. In view of this, the United

States must be charged with the knowledge that such an examination would have given it. *Leather Mfgs. Bank v. Morgan*, ante; *Security-First National Bank v. United States*, 103 F. (2d) 188; *United States v. First National Bank of Chicago*, ante.

In the latter case the United States sued a collecting bank to recover the amount it had received on pension checks which had been issued in the name of a deceased pensioner and which bore his forged signature, guaranteed by the bank. It appeared that prior to the issuance of the checks by the Bureau of Pensions the Veterans' Bureau had had notice of the death of the pensioner and had paid his funeral expenses. In denying recovery to the Government the Court held that it must be charged with knowledge of the death of the payee:

"Plaintiff contends that no duty rested on the Veterans' Bureau to inform the Pension Bureau, because there was no legislative enactment requiring Government officers, agents, and employees to interchange such information. True, but we cannot agree that a statute was necessary to establish such a duty. It is reasonable to conclude that upon the payment of claims for funeral expenses, the Veterans' Bureau would be greatly interested in checking with its related department of pensions to see that such pension payments were terminated. The exercise of reasonable care by a businessman would suggest that the death be reported to the Pension Bureau. Since the United States does business on business terms, [citation] and its agent failed to give such notice, the Pension Bureau is chargeable with knowledge which it should have received. Any other holding would allow the Government as principal to benefit by its agent's or employee's negligence." 138 F. (2d) at p. 684.

Again:

" * * * we think the cases cited to support this position are all distinguishable in that in none of them did

it appear that the Government had actual knowledge of the death of the payee when it issued the checks. Having such knowledge, we think the United States was culpably negligent in issuing them. Having set in motion the machinery which resulted in the loss, it may not now recover from the defendant thereon." 138 F. (2d) at p. 686.

The case here is even stronger than the one just discussed. There the Government merely failed to exercise ordinary business prudence in the issuance of its checks. Here it not only failed to exercise ordinary business prudence, but it failed to comply with a specific statutory command. Here the negligence was palpable. There it was constructive.

In this view, the United States must be held to have discovered the forgeries as they were being committed, and not at the time the fraudulent scheme was actually disclosed in detail in November, 1938. " 'Discovery' means finding something previously unknown." If the Government already knew of the forgery when an examination of accounts should have been made and notice given to the disbursing officer, "then obviously the forgery could not be 'discovered' " in 1938. *United States v. First National Bank of Chicago*, ante, at p. 686. A similar principle was applied in *Detroit Piston Ring Co. v. Wayne County Bank*, ante, and *Scott v. First National Bank*, ante. Those cases, which were approved by this Court in *Washington Loan & Trust Co. v. United States*, ante, held that after the drawers had notice of an unexplained shortage in their funds, they were required to take steps to discover the cause and their failure to do so estopped them from imposing subsequent losses on the drawees.

Finally, all of the 144 checks involved here were ostensibly made payable to just 16 different persons. and bore their forged signatures. During the entire period of the fraud these persons were ranking marine officers in active service, receiving genuine checks from the United States, drawn at

the same office by the same disbursing officers. Thus, unlike *Washington Loan & Trust Co. v. United States*, ante, where the checks were made payable to nonexistent persons, in this case the Government had in its possession at all times the genuine signatures of the payees.

While a drawer is not in ordinary circumstances presumed to know the signature of his payees, where he in fact has such knowledge, or the ready means of acquiring it, he will be charged with negligence in failing to detect forgeries. *Prudential Ins. Co. v. National Bank of Commerce*, 227 N. Y. 510, 125 N. E. 824; *Royal Indemnity Co. v. Federal Reserve Bank*, 38 F. Supp 621, affirmed without opinion, 119 F. (2d) 778.

In the first case cited a district manager of an insurance company forged the signature of policy holders on checks sent to him for delivery to them. The company sued and was awarded judgment against the drawee, which had paid the checks. The Court of Appeals of New York reversed the judgment on the ground that the company had in its possession the genuine signatures of the payees and should have compared them with the signatures on the checks. After stating the general rule that the drawer's duty to examine his checks does not require an examination of the endorsements, the Court continued:

"The reason given for not extending the rule to include an examination of indorsement for the purpose of determining whether they are genuine is that the depositor has no greater knowledge on the subject of the genuineness of the signature than the bank. In the case now before us the plaintiff had in its possession the genuine signature of each of the payees in the several checks * * *. We think in this case it was at least a question of fact upon the evidence before the court * * * whether the plaintiff was negligent in failing to compare the endorsements * * * and whether such negligence, and the consequent failure of the plaintiff to notify the defendant of the infor-

mation that it would have obtained by such examination, contributed to the payment of said checks by the bank." 125 N. E. at p. 828.

In the second case cited, *Royal Indemnity Co. v. Federal Reserve Bank*, the Court denied recovery to a drawer who had paid checks bearing forged endorsements since the "continued failure to compare the signatures of the payees on the checks with the genuine signatures in its possession, as shown by the evidence, was solely and wholly responsible for the loss * * * ." 38 F. Supp. at p. 621.

It is no answer to the foregoing to say that the United States cannot be expected to know the signatures of its many payees. In *United States v. National Exchange Bank of Baltimore*, 270 U. S. 527, 534, it was held that the United States was bound to know the amount of a check drawn by it when such check was presented to it, as drawee, for payment; and that, consequently, where it paid a collecting bank a check which had been fraudulently raised it could not be reimbursed. The Government attempted to escape the operation of the rule on the ground that "the hand that drew and the hand that was to pay were not the same." The Court answered that it could not be "that great business houses are held to less responsibility than small ones. The United States does business on business terms * * * . We are of the opinion that the United States is not excepted from the general rule by the largeness of its dealings and its having to employ agents to do what if done by a principal in person would leave no room for doubt."

On the contrary, if anything, the United States is to be held to a more strict business standard than is a private person. Compare *Walker v. United States*, 139 F. 409, affirmed 148 F. 1022. Everyone with the least experience in business is cautious with respect to private checks. They are accepted only after proof of genuineness, or because the acceptor has confidence in the honesty and financial responsibility of the endorser. If a loss is suffered it is

attributable to the acceptor's own mistake, or credulity, or recklessness, or misplaced confidence. But, as this Court said in *Washington Loan & Trust Co. v. United States*, 77 U. S. App. D. C. at p. 289, Government checks "circulate virtually on the basis of currency." The integrity of the United States is not to be questioned, and the lawfulness of the acts of its agents is presumed. *Lewis v. United States*, 279 U. S. 63; *D'Oench v. Fed. Dep. Ins. Corp.*, 315 U. S. 447.

THE UNITED STATES IS PRECLUDED FROM SETTING UP THE FORGERIES BECAUSE ITS OWN AGENT COMMITTED THEM.

The third circumstance which precludes the United States from recovery is that its own agent perpetrated the fraud and committed the forgeries. The United States will not be permitted to throw the loss thereby occasioned on an innocent party. *Hartford Accident & Indemnity Co. v. Fifth Third Union Trust Co.*, 23 F. Supp. 53, affirmed 111 F. (2d) 762; *American Hominy Co. v. Millikin National Bank*, 273 F. 550; *Armour v. Greene County Bank*, 112 F. 631; *Phillips v. Mercantile Bank of New York*, 140 N. Y. 556, 35 N. E. 982; *Snyder v. Corn Exchange Bank*, 221 Pa. 599, 70 A. 876.

In all of these cases an agent of the drawer first drew checks and then forged the endorsement of the payees' names. It is true that, under the Negotiable Instruments Law of most jurisdictions, the checks in these cases were payable to bearer since they were drawn to the order of one not intended by the drawer to have any interest in their proceeds. But all of the foregoing cases denied recovery on the additional and independent ground that the loss must be borne by the drawer who, by selecting a dishonest agent in the first instance, made the loss possible. And in two of them, *Hartford Accident v. Trust Co.*, and *Snyder v. Corn Exchange Bank*, serious doubts were expressed as to whether the checks could be properly held to be payable to bearer under the Negotiable Instruments

Law, since the agent drawing them on behalf of the drawer had no general authority in that respect.

Consequently, the fact that the checks in the case here were not payable to bearer has no significance in the determination of the issues on the principles of equity. In *United States v. First National Bank of Chicago*, ante, the checks were not payable to bearer, but the Court held that:

“Equitable considerations also dictate that judgment in this case should be for the defendant. Defendant was in no way benefited by collecting these checks. It retained no part of the proceeds collected from the plaintiff.”

THE UNITED STATES IS PRECLUDED FROM SETTING UP THE FORGERIES BECAUSE IT HAS AN ADEQUATE REMEDY AGAINST THE PERSONS PRIMARILY LIABLE.

A fourth equitable consideration which precludes the United States from recovery here is that the United States, not only cannot be required to pay again since there is no true owner of the checks, but can be reimbursed in full for its previous payment. It has a right to be indemnified by the sureties of its disbursing officers who drew the checks in question, and whose negligence, as has been seen, was responsible for the perpetration of the fraud. This Court may take judicial notice of the fact that the United States has instituted suit in the District Court for the District of Columbia against Marion Bell Humphrey, Assistant Paymaster in the Marine Corps, and his surety, the Hartford Accident & Indemnity Company. Civil No. 23234, filed February 24, 1944. The complaint in that suit alleges that Humphrey received “advances of public money for which he was accountable” and “has failed and refused to account to the plaintiff for the sum of \$13,979.58,” which is the amount, with interest, of the spurious checks drawn by

Humphrey; and that the Hartford Accident & Indemnity Company engaged that Humphrey "shall faithfully perform all his duties as Assistant Paymaster."

It cannot be said that this consideration is irrelevant here. The disbursing officers and their sureties are, with the exception of the forger himself, charged with the ultimate responsibility for the success of the fraud. The surety, when required to pay, cannot, by subrogation to the rights of the United States, recover from appellant. *Washington Mechanics Savings Bank v. District Title Ins. Co. et al.*, 62 App. D. C. 194; *American Surety Co. v. Bank of California*, 44 F. Supp. 81; and cases discussed therein. In both of these cases dishonest employees of drawers forged payees' endorsements on and cashed checks, which were paid in due course. In both cases after the sureties for the employees had reimbursed the drawers suit was brought, in the first, against a collecting bank, in the second, against the drawee. This Court, reversing the judgment of the trial court, held that the surety was not entitled to be subrogated to any claim against the bank, saying:

"Subrogation is an equitable right and is applicable where one party is required to pay a debt for which another is primarily answerable and which the latter should in equity discharge. The remedy cannot, as a matter of right, be invoked without regard to the circumstances of the particular case. It can be invoked only in cases where justice demands its application and where the equities of the party asking subrogation are greater than those of its adversary." 62 App. D. C. at p. 196.

In the second case the Court held that the drawer's "primary right" was against the forger and his insurers and that there was nothing which the insurers were entitled to recover "either on principles of subrogation or by assignment" 44 F. Supp. at p. 88. The Court said:

"Public policy requires that when a loss predicated

upon dishonesty is paid by surety (sic) who has assumed that obligation, no subrogation should follow except against the wrongdoer * * *, when the sureties pay the loss caused under such circumstances they do nothing more than to satisfy the obligation which they assumed for hire." 44 F. Supp. at p. 86.

In this view, since apparently appellant could not be subrogated to the rights of the United States against the sureties, *Washington Mechanics Savings Bank v. District Title Ins. Co.*, ante, equity requires that appellee be denied recovery here and forced to pursue its agents and their sureties, thus placing the loss where "public policy requires," on the sureties who assumed the obligation for hire.

THE UNITED STATES IS PRECLUDED FROM SETTING UP THE FORGERIES BECAUSE APPELLANT IS ENTIRELY INNOCENT AND WAS NOT BENEFITTED IN ANY WAY BY COLLECTING THE CHECKS.

Admittedly, in order to invoke estoppel, appellant must be free of any negligence or misconduct. *United States v. Bank of New York*, 219 F. 648. But appellee does not deny, as it could not, that appellant is entirely innocent and has received no benefit from its collection of the checks. Consequently, the application of the doctrine of estoppel is required.

Probity in cases of this nature has always been a successful defense in the Supreme Court of the United States. Throughout its history, that Court has not imposed liability upon a bank which has innocently collected spurious or raised Government checks. *United States v. Chase National Bank*, 252 U. S. 485; *United States v. National Exchange Bank of Baltimore*, 270 U. S. 527; *United States v. Guaranty Trust Co.*, 293 U. S. 340; *United States v. First National Bank of Chicago*, 138 F. (2d) 681; *American*

Surety Co. v. Bank of California, 44 F. Supp. 81, affirmed 133 F. (2d) 160; *Security First National Bank v. United States*, 103 F. (2d) 188; *Champ Springs Co. v. United States*, 47 F. (2d) 1; *Ladd & Tilton Bank v. United States*, 30 F. (2d) 334; *England National Bank v. United States*, 282 F. 121; *United States v. American Exchange Bank*, 70 F. 232; *United States v. Bank of America*, 47 F. Supp. 279; *Wells Fargo & Co. v. United States*, 45 F. 337; *United States v. Citizens Union National Bank*, 40 F. Supp. 609; *United States v. National Rockland Bank*, 35 F. Supp. 912; *United States v. National City Bank*, 28 F. Supp. 144; *United States v. First National Bank & Trust Co.*, 17 F. Supp. 611; *United States v. Bank of New York*, 219 F. 648; *United States v. National Exchange Bank*, 45 F. 163.

In *United States v. Chase National Bank*, 252 U. S. at p. 493, Mr. Justice McReynolds said:

“* * * the record discloses substantial evidence to support the finding necessarily involved that no actual neglect or bad faith, attributable to defendant, contributed to the success of the forgery.”

In *United States v. National Exchange Bank of Baltimore*, 270 U. S. at p. 534, Mr. Justice Holmes said:

“* * * the drawer cannot recover for an overpayment to an innocent payee * * *.”

In *United States v. Guaranty Trust Company*, 293 U. S. at p. 344, Mr. Justice Brandeis said:

“The evidence consisted of an agreement as to facts and the canceled check * * *. That each of these banks paid a valuable consideration, received the check in good faith, took it without notice of the forgery or other defect, and was not guilty of any fraud or negligence * * *.”

Recently, in *United States v. First National Bank of*

Chicago, 138 F. (2d) 681, the Circuit Court of Appeals for the Seventh Circuit said:

The checks "came to it for collection * * *."

"it did not keep the proceeds * * *."

"Defendant was in no way benefited by collecting these checks * * *."

And in *County of Oneida v. First Citizens Bank*, 35 N. Y. S. (2d) at p. 785, the Appellate Division of the Supreme Court of New York said:

"There is no suggestion in the papers that the defendant enriched itself in any degree by cashing the warrants in suit."

It is this complete innocence of, and absence of benefit to, appellant, as well as the fact that these checks were altered on their face, that distinguishes the case at bar from *Washington Loan & Trust Co. v. United States*, ante. It is true that the Columbia National Bank there, like appellant here, was an innocent collecting bank. But from beginning to end the case was considered from the standpoint of the Washington Loan and Trust Co. The District Court entered an order (Appts.' App. 22) upon the defendants' motion, and with the plaintiff's consent, consolidating the three cases for trial, the Court adjudging that "said causes of action involve common questions of law and fact." The defenses of all three were alike and the pleadings in the *Washington Loan & Trust Co.* case were the only ones before this Court on the appeal. In the "Statement of Points" on which the banks relied (Appts.' App. 63) the question of innocence was not raised. The three banks filed a joint brief and their counsel stated in argument that they all stood or fell together.

The Government too dealt with the three appeals as one. In its Brief, p. 4, it stated: "The proximate cause of the loss was the act of the banks in *cashing* the checks bearing

forged endorsements *in reliance upon Stitely, the forger.*" And again: "The defendant banks *in cashing* the checks assumed full responsibility." (Italics supplied). This Court, obviously proceeded on that basis, treated the entire case, as appellee here admits, Brief p. 8, from the standpoint of the Washington Loan & Trust Company, which had cashed more than 700 checks for the forger directly, and which kept in its possession for its own benefit the money collected on them.

APPELLEE'S POSITION IS UNTENABLE.

Appellee, in arguing that it is not precluded from recovery, seeks to avoid the effect of all of the foregoing in several ways. First, it says that the fact that appellant is an innocent collecting bank is of no consequence. It wholly ignores the recent case of *United States v. First National Bank of Chicago*, ante, relying on *Washington Loan & Trust Co. v. United States*, ante, and on *Clearfield Trust Co. v. United States*, ante.

The distinction between this case and the *Washington Loan & Trust Co.* case has already been shown, both here and in the main brief. As to the *Clearfield* case, whether or not the collecting bank was innocent was entirely irrelevant there. There were no alterations on the face of the single check there involved. The Government's conduct in its issuance was concededly beyond reproach. It had done nothing to preclude it from setting up the forgery, and liability remained to the true owner. Consequently, the defense of estoppel was not available to the bank, and its innocence and freedom from negligence never came into question. In contrast, in *United States v. First National Bank of Chicago*, ante, the Government had done something to preclude it from setting up the forgery, while the collecting bank was innocent and free from negligence. Consequently, recovery by the Government would have been inequitable and was denied.

Appellee next says that the statutes and regulations, the violation of which made the fraud possible, are for the exclusive protection of the Government and may not be invoked by appellant. This is, at best, a misconstruction of appellant's contention. It is not argued that the statutes and regulations themselves foreclose recovery by the Government. It is only argued that the negligence of the Government in the issuance of the checks precludes it from throwing the loss upon appellant, and that that negligence is evidenced by the failure of the Government to comply with the statutes and regulations. Moreover, appellee itself, in *United States v. First National Bank of Chicago*, ante, argued that it could not be guilty of negligence *unless* there was a statute or regulation imposing a duty on it.

The Government next attacks appellant's authorities on three completely untenable grounds. First it brushes off as of no consequence those which refer to what it calls "the old saw that as between two equally innocent persons he who has made a loss possible must bear it." As to this, suffice it to say that this Court invoked this principle as recently as January 17, 1944, in *Melvin v. Melvin*, No. 8574, where, in holding that the power to order restitution is equitable in its nature, it quoted the language of *Atlantic Coast Line R.R. v. Florida*, quoted by appellant, ante. See also *Central National Bank v. National Metropolitan Bank*, ante.

Second, appellee claims to be inapposite those cases in which only a drawer and his drawee were involved. But as this Court said in the *Washington Loan & Trust Company* case, 77 U. S. App. D. C. at p. 286: "While most of the decided cases deal with parties in the relation of drawer and drawee, which is not this case, that is no reason for the application of a different rule."

Third, it says, Brief p. 12, that appellant's authorities are of no help because the principles of estoppel first laid down in *Price v. Neal* have become "a mechanical rule to

promote negotiability by certainty," and that the rule is inapplicable in the circumstances here. It is submitted that it is patently absurd to say that any rule, the application of which requires the balancing of equities, is mechanical, and that the authorities discussed by appellant demonstrate that the courts have not so treated the principles of estoppel.

To illustrate that it was not the purpose of the Negotiable Instruments Law to supply mechanical rules for the determination of the rights of parties to commercial paper, and that the courts will apply the doctrine of estoppel irrespective of and notwithstanding that law, two cases may be contrasted. *Central National Bank v. National Metropolitan Bank*, 31 App. D. C. 391, and *United States v. First National Bank*, 124 F. (2d) 484, were both cases in which drawers delivered checks to imposters who forged the true payees' endorsements. In such circumstances many cases deny recovery against a holder on the rationalization that there is really no forgery since the drawer intends the check to be endorsed by the very person to whom he gives it. Brannon, *Negotiable Instruments Law* (6th Ed. 1938) pp. 349-358. However, both of these cases went beyond that rule of thumb, considered the equities, and decided the cases accordingly. This Court *refused* recovery on the ground that the drawer, having delivered the check to the imposter, made the first mistake, and could not throw the loss on an innocent party. The Circuit Court of Appeals for the Tenth Circuit *allowed* recovery on the ground that the holder, having first established contact with and reposed confidence in the imposter, made the first mistake and first contributed, albeit unwittingly, to the fraud.

Moreover, if the rule be considered mechanical, the alterations on the face of these checks bring this case squarely within it.

Finally appellee says, not that the circumstances of the issuance and payment of these checks do not make a case

for estoppel, but that the principle of estoppel is inapplicable because it "brings this suit on the guarantees in its capacity as drawee;" this "personal written undertaking by the presenter is absolute and makes all other considerations irrelevant;" "neither it nor the Treasurer undertook any duty to the presenting bank;" and the "fact that the presenting bank has paid over the proceeds or that the drawee may not be liable to the drawer because the latter is precluded from asserting the forgeries as against the drawee does not relieve the presenting bank of liability on its guarantee." Brief, pp. 21, 22. In view of the explicit language of this Court in *Central National Bank v. National Metropolitan Bank*, 31 App. D. C. at p. 401, this proposition cannot stand. That was a suit by a drawee against a collecting bank which had received the proceeds of a check bearing the payee's forged endorsement, which it had guaranteed. In holding that the collecting bank, regardless of its guaranty, could defend on the ground that the drawer had delivered the check to an imposter, this Court said: " * * * in order that the bank may recover it must appear that it has sustained a loss. If it can charge the payment to the account of the depositor, it has lost nothing and has no cause of action." This same proposition of appellee was specifically made and specifically rejected in *United States v. Guaranty Trust Co.*, ante, and *United States v. First National Bank of Chicago*, ante.

"The express guarantee of prior endorsements means no more than what is implied by every unrestricted endorsement, namely, that the endorsements are effective to give to the holder a legal title and the right to enforce payment of the check." *United States v. Guaranty Trust Co.*, 293 U. S. at p. 349.

Similarly, see *State Planter's Bank & Trust Co. v. Fifth Third Union Trust Co.*, 56 Ohio App. 309, 10 N. E. (2d) 935; *Figuers v. Fly*, 137 Tenn. 358, 193 S. W. 117, 122.

In addition, since appellee is in fact both drawer and

drawee, it may be said that different considerations apply. Thus, in *Madison etc. Bank v. Madison Sq. State Bank*, 271 Ill. App. 12, an employee fraudulently induced a bank to issue cashier's checks, the endorsements on which the employee then forged. The Court denied the drawer-drawee bank recovery against the collecting bank. The Court had before it *United States Cold Storage Co. v. Central Bank*, 343 Ill. 503, 175 N. E. 825, which was quoted and relied upon by Chief Justice Groner in the *Washington Loan & Trust Co.* case, but held it to be inapplicable in view of the position of the bank as both drawer and drawee.

The six following cases cited by the appellee in support of its proposition are all distinguishable. In five of them the checks were valid in their inception. In one of them the check itself was forged. In all of them there was either freedom from negligence on the part of the drawer, or negligence on the part of the bank, or both.

McKinnon v. Boardman, 170 F. 920: In that case the draft was valid and unless recovery had been allowed the drawer-drawee would have had to pay again. The defendant had negligently dealt with the forger and cashed the check for him. There was no negligence attributable to the drawer-drawee.

First National Bank of Winsboro v. First National Bank, (Tex. Com. App.) 299 S. W. 856: In that case the defendant bank was a depository of public funds and therefore had an initial contractual relationship with the drawer. The defendant bank was bound to know the signature of the drawer, which was forged. The defendant had recourse over against the cashing banks, and the case dealt primarily with the latter's liability. The Court held that the cashing banks were negligent in cashing the checks for the forgers, while there was no negligence attributable to the drawer in the issuance of the checks.

New York Produce Exchange Bank v. Twelfth Ward

National Bank, 119 N. Y. Supp. 988: That case, which was considered by the Supreme Court in *United States v. National Exchange Bank of Baltimore*, ante, involved a raised and altered check. The check was valid in its inception. No negligence was charged against the drawer. The suit was against the bank which cashed the altered and raised check.

Hartford-Connecticut Trust Co. v. Riverside Trust Co., 123 Conn. 616, 197 A. 766: In that case the check was valid and liability on it remained to the true owner. The suit was against the bank that dealt with the forger.

Manufacturer's Trust Co. v. Harriman National Bank & Trust Co., 262 N. Y. Supp. 482: This case involved an altered and raised check. Defendant dealt with the forger and cashed the altered check. No negligence was charged to the drawer.

Second National Bank v. Guarantee Trust & Safe Deposit Co., 206 Pa. 616, 56 A. 72: Suit was against the bank which cashed the check for the forger.

**THE UNITED STATES IS BARRED FROM RECOVERY
BECAUSE IT HAS DEPRIVED APPELLANT OF
ITS RIGHT OF RECOVERY OVER.**

Apart from the doctrine of estoppel, another equitable consideration which bars the United States from recovery here is that the unwarranted delay in the institution of this suit has damaged appellant by depriving it of its recourse against prior endorsers. The District Statute of Limitations governing claims of this nature provides that suit must be brought within three years after the right to sue accrues. 12 D. C. Code (1940) s. 201. A right in the United States to sue arose immediately upon the payment of each check. The "right of action accrues, and the Statute of Limitations begins to run, immediately upon payment."

Leather Mfgs. National Bank v. Merchants Bank, ante. Notwithstanding this, the Government did not sue until more than six years after the first check was paid, and nearly four years after the last check was paid and the fraud laid bare.

It is true that the Statute of Limitations does not run against the United States. 12 D. C. Code (1940) s. 204. But it is equally true that laches will bar the United States on a claim of this kind. *Cooke v. United States*, ante; *United States v. Guaranty Trust Co.*, ante; *Clearfield Trust Co. v. United States*, ante; *Ladd & Tilton Bank v. United States*, 30 F. (2d) 334. In the *Cooke* case the Supreme Court said:

“Laches is not imputable to the government, in its character as sovereign, by those subject to its dominion. Still the government may suffer loss through the negligence of its officers. If it comes down from its position of sovereign and enters the domain of commerce, it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawees and endorsers that is required of individuals; and if it fails in this, its claim upon the parties is lost.” 91 U. S. at p. 398.

Compare *Walker v. United States*, 139 F. at p. 415; *United States v. National City Bank*, 28 F. Supp. 144.

Normally, in determining the question of laches, “Courts of equity hold themselves bound by the Statute of Limitations that would govern an action at law upon the same demand * * * the bar of limitation will be applied, either in obedience to the statute, or by analogy, in the same way as at law.” *Washington Loan & Trust Co. v. Darling*, 21 App. D. C. 132, 140. In this case there is no reason to depart from this rule and every reason to adhere to it. Appellant is entirely without fault. At no time did it have any dealings with the forger. It took the checks in question

for collection. It changed its position when they were paid by turning over their proceeds to the bank that cashed them. They carried the prior endorsement of that bank. Consequently, if called upon to reimburse the Government, appellant would, under familiar principles, be entitled to recover from that bank. *Negotiable Instruments Law*, 28 D. C. Code (1940) s. 507; *Brady Bank Checks* (2d Ed.) s. 167; *Central National Bank v. National Metropolitan Bank*, ante; *Bergman v. Avenue State Bank*, 284 Ill. App. 516, 1 N. E. (2d) 432; *Mfgrs. Trust Co. v. Harriman National Bank & Trust Co.*, 146 Misc. 551, 262 N. Y. S. 482. But since the Statute of Limitations does run against appellant, the laches of the United States had barred this right of recovery over before this suit was filed.

In *Clearfield Trust Co. v. United States*, ante, the Supreme Court held that lack of prompt notice of the forgery would be a defense in an action against a collecting bank if the latter showed that the delay caused him damage. The Court found no such damage in the case before it since the collecting bank, so far as appeared, could still recover from the prior endorser. So too, in *Washington Loan & Trust Co. v. United States*, ante, while the question was not discussed in the opinion of this Court, it was obvious that any delay could cause the bank no real damage, since the right of recovery against the only prior endorser, the forger, was in fact worthless. In contrast, here the Government, by delaying its suit until after the Statute had run, has damaged appellant by completely cutting off its right of recovery against a responsible prior endorser, the cashing bank. To permit the Government to prevail would be to cause appellant precisely the loss the Supreme Court held it need not bear. If appellant is not required to bear a loss flowing from lack of prompt notice, the giving of which is not a condition precedent to suit, *Leather Mfgrs. Bank v. Merchants National Bank*, ante, *United States v. National Exchange Bank of Providence*, 214 U. S. 302, *a fortiori* it is

not required to bear a loss flowing from lack of prompt suit.

As was held in *Ladd & Tilton Bank v. United States*, 30 F. (2d) at p. 337, approved by the Supreme Court in the *Clearfield* case:

“It would be a harsh rule and wholly devoid of equity and good conscience which would provide that one paying a forged instrument, after discovering the forgery, might nevertheless complacently rely on an implied warranty for the full period of the statute of limitations and then recover from one who also innocently relied on the validity of the endorsement, and who, *by delay in the bringing of the action* or giving notice, has lost all means of protecting himself from those primarily liable. As the statute of limitations does not run against the government, its delay could be indefinite. Such a rule ought not to be and is not the law.” (*Italics supplied*).

Appellee recognized the applicability of this rule in *United States v. First National Bank of Chicago*, ante, where it argued that it should be allowed to recover on those checks as to which the collecting bank still had recourse against prior endorsers.

Furthermore, had the Government instituted suit within the time allowed by the Statute, appellant, under the Federal Rules of Civil Procedure, could have impleaded the prior endorser and the entire matter would have been settled in one action. See *City of New York v. Bronx County Tr. Co.*, ante; *First National Bank of Winnsboro v. First National Bank*, ante.

Nor can it be argued that appellant should have paid appellee's demand in 1938 and proceeded against the prior endorser. Had it done so it would have run the risk of being denied recovery against the prior endorser—as was the case in *Central National Bank v. National Metropolitan Bank*, ante,—on the ground that the Government was not entitled to restitution, since appellant had only such right against the prior endorser as the Government has against it.

"It is true that [the drawer] was not a party to the action, but the plaintiff, [drawee] having recognized his right to the return of the money, * * * has taken his place, and is bound by whatever would bind him had it refused his demand for repayment and the action had been by him against it to recover money paid under a forged endorsement of his check."

Again:

"* * * there is no cause of action unless the payment of the check was not, as against the drawer, a good payment." *Central Nat'l Bank v. Nat'l Metropolitan Bank*, 31 App. D. C. at p. 396.

Compare *National Bank v. Seattle National Bank*, 109 Wash. 312, 187 P. 342.

The risk of being denied recovery against the prior endorser was not small. Until March 1, 1943, when the *Washington Loan & Trust Company* case was decided, the law in the District of Columbia absolutely denied the United States recovery in circumstances similar to those there. *United States v. Commercial National Bank*, Sup. Ct., D. C., Law No. 77,050 (1933).

**THE UNITED STATES IS BARRED FROM RECOVERY
BECAUSE IT HAS FAILED TO ESTABLISH A
A BETTER LEGAL TITLE IN ANY OTHER THAN
APPELLANT.**

Finally, apart from equitable considerations, there is an additional reason for barring recovery by the United States here. Dean Ames, in "The Doctrine of *Price v. Neal*," 4 Harv. Law Rev. 297, took the position that the real basis of that case was the ancient precept that where the equities are equal the legal title will prevail. He pointed out that the equities were equal since both the holder and the drawee took the instrument believing it to be genuine. But the holder, having received the proceeds of the instrument, had

the legal title to the money in suit. Furthermore, since the drawer's signature was forged, the holder, at the time of presentation for payment, had legal title to the instrument, however spurious and valueless. The author reasoned from this that the doctrine of *Price v. Neal* is not normally applicable where the forgery is in the endorsement of a genuine check because the holder has no title to the instrument. Title to it is in the true owner whose name has been forged. Therefore, by presenting it to the drawee or drawer and receiving payment, the holder is guilty of conversion, for which he is liable to the true owner. He also becomes liable to the drawer and/or drawee, since the latter are still required to pay the former. 31 Harv. Law Rev. 304.

This rationale is accepted by the Supreme Court of the United States and by this Court. *Leather Mfgs. Bank v. Merchants Bank*, ante; *United States v. National Exchange Bank of Providence*, ante; *United States v. Guaranty Trust Co.*, ante; *District National Bank v. Washington Loan & Trust Co.*, 62 App. D. C. 198. "The theory of the *National Exchange Bank* case is that he who presents a check for payment warrants that he has title to it and the right to receive payment." *Clearfield Trust Co. v. United States*, 318 U. S. at p. 368. This is also the view of appellee here. On page 9 of its Brief it states that "the basis of a presenting bank's liability is not possession of the funds nor negligence nor fault but the breach of its express guarantee or implied warranty of title."

It necessarily follows from the foregoing that, once paid, the holder will be permitted to keep the proceeds of an instrument to which none has a better legal title. It was so held in *United States v. Chase National Bank*, ante, and in *United States v. Guaranty Trust Co.*, ante. And the *Restatement of Restitution*, s. 35, after stating the general rule that one who has received payment on a negotiable instrument bearing a forged endorsement is required to restore the sum paid, comments that the rule is dependent

upon lack of title in the holder "and hence does not apply where he has title, irrespective of a forgery of the name of an ostensible party * * *." Appellee here concedes this. On page 17 of its Brief it states that "if the presenting bank could have obtained a valid title despite the forgeries, there could be no recovery."

Since then it is the forged endorsement of a *genuine* check that conveys no title because the drawer and/or drawee remain liable to the true owner, 31 Harv. Law Rev. 304, appellant, as holder, is entitled to keep the proceeds of the checks involved here. They were never valid instruments. They were never capable of genuine endorsement. They never represented a legal obligation of the United States. Compare *Cooke v. United States*, ante. Neither the named payees nor the forger ever had any legal title to them. None had a better legal title than appellant. As the Supreme Court said in *United States v. Chase National Bank*, 252 U. S. at p. 493, a case in which the signatures of both the drawer and the drawee were forged:

"If the draft had been a valid instrument, with a good title thereto *in some other* than the collecting bank, nothing else appearing, the drawee might recover as for money paid under mistake. But here the whole instrument was forged, never valid, *and nobody had a better right to it than the collecting bank.*" (Italics supplied).

Again, at page 495:

"He [drawee] cannot be called upon to pay again, and the collecting bank has not received the proceeds of an instrument to which another held a better title."

So in this case the United States "cannot be called upon to pay again, and [appellant] has not received the proceeds of an instrument to which another held a better title." To the same effect is *Postal Tel. Co. v. Citizens' National Bank*, 228 F. 601, where the situation was the same as that in the

Chase National Bank case and where it was taken for granted that if the bank was a *bona fide* purchaser it could retain the money.

CONCLUSION.

To sum up the United States is barred from recovery here, first, because it is precluded from setting up the forgeries. It is so precluded because (1) the checks were altered on their face, (2) the United States negligently and unlawfully issued the checks, (3) the United States negligently failed to discover the fraud for more than two years, (4) an agent of the United States committed the forgeries, (5) the United States has an adequate remedy against the persons primarily liable, and (6) appellant is entirely innocent and was not benefited in any way by collecting the checks. Second, the United States is barred from recovery because by failing to institute suit within the statutory period therefor, it has deprived appellant of its right of recovery over. Third, the United States is barred from recovery because it has failed to establish a better legal title to the checks or the proceeds thereof in any other than appellant. Fourth, the United States is barred from recovery because it has not shown that the money was received in such circumstances that appellant will give offense to equity and conscience if permitted to retain it. The equities of the United States are not Superior to those of appellant.

Respectfully submitted,

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